UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

A.S.V., INC. A/K/A TEREX Respondent/Employer and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO Charging Party/Petitioner	Cases 18-CA-131987, 18-CA-140338, and 18-RC-128308

BRIEF TO THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF THE GENERAL COUNSEL

Submitted by:

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I. STATEMENT OF THE CASE

The employees of A.S.V., Inc. (Respondent) courageously chose to exercise their protected rights under the National Labor Relations Act (Act) by seeking to organize with the International Brotherhood of Boilermakers (Union). In response to this organizing campaign, Respondent violently retaliated against employees by threatening them with job loss and plant closure, interrogating them regarding their union sentiments, and ultimately terminating employees following two union elections.

Respondent argues that its actions were lawfully motivated by legitimate business considerations. Respondent's case, however, is fatally undermined by the timing of its actions. The timing of Respondent's threats of closure, directly in response to union's victory in the paint election. The timing of Respondent's deliberations about terminating production employees—which began only *after* the Union filed its election petitions in the production departments. The timing of Respondent's alleged business downturn—a tool to be used only *after* employees begin organizing, despite worse labor efficiency numbers in the beginning of 2013 and an unprecedented run of success at the beginning of 2014. The timing of Respondent's "flip" from a well-developed waste-water treatment plant (WWTP) as a solution to a long-standing zinc problem to "under the gun" outsourcing—which began only *after* employees started engaging in Union activity. The timing of Respondent's decision to finalize the terminations—which occurred at 9:03 pm on the eve of the election in the paint department (and the possible imposition of a

bargaining obligation over this decision). Respondent characterized the timing of all of these decisions, and others, as a "perfect storm." (Tr. 32). Counsel for the General Counsel agrees that it was a "perfect storm"—of thinly veiled excuses that do not satisfactorily explain Respondent's actions. Rather, the timing of Respondent's adverse actions, *all of which occurred only after employees' began engaging in union activity*, in combination with Respondent's truly singular animus towards its employees' exercise of their protected rights under the Act, demonstrate that Respondent was truly motivated to decimate the Union's ongoing organizing campaign—regardless of the financial costs or the legal barriers that stood in its way. These actions cannot be allowed to stand and demand the strongest remedial measures available under the Act.

This brief will be organized as follows. First, Counsel for the General Counsel will provide a brief explanation of the facts underlying this matter. Second, Counsel will examine the 8(a)(1) allegations in this case, and demonstrate that Respondent committed numerous "hallmark" violations of the Act in response to the Union's victory in the paint department. Third, Counsel will address Respondent's unlawful actions in response to their organizing activity—1) by establishing a strong showing under *Wright Line*; 2) by addressing the frankly ridiculous matrices utilized in determining who would be terminated; 3) by dismantling Respondent's spurious business downturn argument; and 4) by destroying its rushed outsourcing justification, which was in fact driven by a long-standing zinc problem. Fourth, Counsel will address the curious transfers of two

welding/fabrication employees into the assembly department, and demonstrate why this decision was also motivated by unlawful animus. Fifth, Counsel will demonstrate that, in light of Respondent's severe unfair labor practices, the Union's loss in the assembly election, and its previously-established majority support, a *Gissel* bargaining order is warranted to remedy Respondent's severe unfair labor practices. Finally, Counsel will demonstrate why deferral to certain individual settlement agreements is not appropriate given the collective rights at issue here.

II. STATEMENT OF FACTS

A. Background

Respondent is an employer engaged in the manufacture of construction equipment at a facility in Grand Rapids, Minnesota. (Tr. 57.)[1] It is part of Terex Construction Group, a large multinational company with plants throughout the world. Respondent's employees construct the two products that are manufactured at its plant: compact track loaders (CTLs); and skid steer loaders (SSLs). (Tr. 57; GCX 5(a)–(b).) These products are, in turn, sold by Respondent's parent company, Terex Construction Americas, to construction and rental companies. (Tr. 67.)

Prior to the instant dispute, Respondent's employees were not represented by a union. There was, however, at least one prior attempt to organize at Respondent's facility by the Operating Engineers Local 49 (referred to as the 49er's). (Tr. 137, 484.) Many of the employees involved in the current organizing effort with the Boilermakers were also involved in the organizing campaign with the 49ers. (Tr. 845, 928, 939.) As with the instant Union organizing campaign, Respondent laid off employees around the time that employees began expressing interest in forming a union. (Tr. 1861, 1864.)

B. The Present Union Organizing Campaign

Employees at Respondent's plant contacted the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO

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[1] References to the attached transcript of the underlying administrative hearing will be denoted by "Tr." References to the attached exhibits entered by Counsel for the General Counsel will be referenced as "GCX." References to exhibits entered by Respondent will be referenced as "RX." References to exhibits entered by the Charging Party will be referenced as "CPX."

(Union) seeking representation around January 2014. (Tr. 467, 521.) This initial contact led to union meetings with employees and efforts to solicit authorization cards from employees in various areas in the plant. (Tr. 469–70.) Respondent became aware of these organizing efforts, at the latest, after the Union handbilled at Respondent's facility on April 7. (Tr. 513, GCX 48(a).) After gathering sufficient support from Respondent's employees, the Union filed representation petitions with Petitioner's Regional Office on May 9 seeking elections in two units (paint and undercarriage). (GCX 3(a), 4(a).)

After the petitions were filed, the parties were unable to reach an agreement on the appropriateness of the petitioned-for units. This led to a representation hearing at the Regional Office in Minneapolis on May 20. The Union brought along two employee witnesses to support its arguments regarding the appropriateness of the units—Lee Kostal, from the paint department, and Dave Helvie, from the undercarriage unit. (Tr. 456.) At the outset of this hearing, the Union and Respondent reached an agreement on the appropriateness of the paint unit, setting an election date on June 18. (GC 4(b).)

The parties did not, however, reach agreement on the undercarriage unit. The Region conducted a hearing on the appropriateness of this unit, and on May 29, the Regional Director issued a decision finding that the petitioned-for unit was inappropriate and directing that an election be held for the entire assembly department if a sufficient showing of interest could be obtained from the assembly employees. (GCX 1(m).) This decision had the effect of expanding the petitioned for

unit from approximately 16 employees to about 42 employees. (GCX 4(d).) This unit later decreased to 41 employees after an employee was terminated sometime in early June.[2] (Tr. 52.)

On June 4, the Union submitted authorization cards from a majority of employees (26 out of 42, later decreased to 41 employees) in the assembly department to the Regional Office. (GCX 50.) The parties scheduled the assembly election for June 25, one week after the paint election. (GCX 4(c).)

C. Respondent's Response to the Union Campaign

Respondent first acknowledged to employees that it was aware of the Union campaign at a town hall meeting on April 16. At this meeting, DiBiagio told employees that he had heard a "rumor" that "some folks are very interested in bringing a bargaining unit into the facility." (GCX 53(a) at 29–30.) After this initial April meeting, Respondent continued to hold meetings with employees to discuss the Union. (GCX 8, 9, 10, 11, and 12.) By June, many of these meetings focused solely on Respondent's negative views towards unions and the Boilermakers in particular. (GCX 10, 11, and 12.)

In the weeks leading up to the paint election on June 18, Respondent's managers initiated several individual conversations with employees about the Union. In particular, Respondent's Paint, Weld, and Fabrication Manager Joan Hoeschen targeted Paint Lead Kerry Esler. About two and a half weeks before the

[2] The name that is crossed off GCX 4(d) represents the parties' stipulation that this employee was terminated prior to the instant unfair labor practices. (Tr. 52.)

paint election, Hoeschen approached Esler in the paint department, pointed at painter Lee Gustafson, and asked Esler how he thought Gustafson would vote in the election; in response, Esler told her that he didn't know, and that she "would have to wait till they vote." (Tr. 692) A few days later, Hoeschen again approached Esler, and asked him what he thought about the Union. Esler responded that he didn't want anything to do with it; Hoeschen responded sharply that "being passive don't help anything." (Tr. 692.) Around that same time, Hoeschen again brought up the election with Esler on the paint floor, and asked him specifically how paint and undercarriage were going to vote; Esler responded that he thought paint was 80 percent for the union, and undercarriage was 100 percent in support of the union. (Tr. 692–93.)

Test Track Supervisor Buck Storlie also discussed the Union with test track employees Brandon Rajala and Mike Wilson around the same period of time. While Rajala and Wilson were working in the test track garage, one of them asked Storlie what his thoughts were about the Union. In response, Storlie told the employees that "Terex isn't fucking screwing around. They will move the plant." (Tr. 872; *see also* Tr. 891, 897.)

On June 18, despite Respondent's efforts campaigning against the Union, employees in the paint department voted overwhelmingly in favor of the Union, 10-1. (GCX 3(c).) The results of this election result triggered what can only be characterized as a meltdown by Respondent.

On June 19, the day after the paint election, Respondent's General Manager James DiBiagio called a mandatory meeting of all employees in the assembly unit. (Tr.114–15.) DiBiagio opened the meeting by explaining to employees that he had stayed up late the previous night authoring a written statement, and that this was his response to the painter's decision to be represented by the Union. (Tr. 119; GCX 11.)

This powerpoint, which is in the record as GCX 11 and was read verbatim to employees at this meeting, contained numerous threats of plant closure, job loss, and unspecified adverse consequences if employees in the assembly unit chose to be represented by the Union. (Tr. 114.) These threats, which were uttered in the context of statements of other occasions where Respondent had considered closing or selling the facility (GCX 11 at 9–10), included:

- "Nobody *WON* anything with that election yesterday . . . certainly not the painters because now they have taken a huge risk with their decision to be represented by the union." (GCX 11 at 3.)

- "The mud-slinging arm twisting bullshit I told you was going to happen and the damage it has already done is inexcusable." (GCX 11 at 4.)

- "To me credibility is everything. If I can't trust you, you are nothing to me . . . I have worked my ass off to do everything I could possibly do to help you and I have the track record to prove it. You know you can trust me. I have been straight with you since the day I walked in here and I am going way out on a limb to be straight with you right now. Yet you want to bring a damn union for what ?? [sic] What have they done to earn your trust?" (GCX 11 at 5.)

- "I have had to fight for your existence each and every day to keep the wolves at bay and just when we build a little breathing room here we go pulling a dumbass move like bringing in a union[.] Our business is dropping like a rock. Orders are plummeting, we are going to go through a rough time over the next several months and instead of pulling together to weather the storm you decide to bring in a union? Unfuckin[g] believable." (GCX 11 at 10.)

- "Terex had multiple unionized factories, most of them are gone. . . I had to close 4 union plants in my career—UAW, UAW, Asbestos and haz waste workers, Teamsters. Unionized facilities simply struggle to remain competitive. I have had to look into the eyes of a lot of people and tell them their plant was closing. That's why I have such a passion for this and why it really pisses me off when I see the audacity in this room after all the company has done for you." (GCX 11 at 11.)

- "By doing all of this union crap you've thrown us back almost all the way to square one." (GCX 11 at 12.)

- "I hope you all are smart enough not to follow suit and make the same mistake because what you decide will determine the future direction of the business." (GCX 11 at 13.)

DiBiagio was not content to let these lines speak for themselves. Rather, as one employee described, DiBiagio was so angry while delivering these lines that it looked as if he was "having a heart attack." (Tr. 628.) Additionally, employees from the meeting testified that DiBiagio's cursing during this speech was unprecedented

in the plant. (Tr. 119, 559, 595–96, 616; *see* GCX 54 (employee discipline for swearing).)

Within minutes of the conclusion of the DiBiagio meeting, Shipping, Receiving, and Warehouse Supervisor Nancy Dahlgren approached assembly employee Doug Lake while he was preparing to go back to work. (Tr. 617.) Dahlgren asked Lake what he thought of the meeting. Lake responded that "I have never been and never will be affected or influenced by fear." Upon hearing this statement, Dahlgren told Lake "I'm 52 years old and I really don't want to have to start over. I've worked other union . . . places... and when they came in, we had to move on." Lake again reiterated that he had made up his mind on which way he was going to vote. Dahlgren responded by saying that "Well, I guess I'll move back to the Cities then." (Tr. 617–18.)

On June 23—two days before the assembly election, Respondent again called the assembly unit together to discuss the union campaign. At this meeting, the president of Terex's construction division, George Ellis, flew to Grand Rapids and spoke to employees regarding the Union campaign. (Tr. 122.) This visit had not been previously scheduled, and was motivated solely by the results in the paint election. (Tr. 120, 1071–72.)

During his thirty-minute speech, Ellis piggybacked on the remarks made by DiBiagio. Rather than disavow DiBiagio's threats made only days earlier, Ellis reiterated the threats. He told employees that he "supported everything that [DiBiagio] had said in the prior meeting." (Tr. 994, 1080–81.) Ellis also told

employees that he had control of where the work was placed, pointing to his chest to emphasize his control over the work. (Tr. 561–62, 598, 619–20, 630, 994, 1060.) After making this statement, Ellis told employees that there were plants in Oklahoma and Indiana that had the potential to take work from the Grand Rapids plant. (Tr. 561–62, 598, 620, 630, 994.) Ellis characterized these facilities as "flexible" facilities. (Tr. 1059–60.) These "flexible" facilities were contrasted with two unionized facilities that Respondent had shut down. Ellis characterized these facilities as lacking "flexibility," although he did not provide any objective examples of this inflexibility at union facilities. (Tr. 1060, 1078–79.) Ellis then told employees that he had moved work from the union facilities to more "flexible" non-union facilities. (Tr. 1061.) During his speech, Ellis also told employees that it was "unfortunate that we're at this juncture" because Respondent was considering giving out a bonus scheme to employees but that scheme was in jeopardy because of the cost of the Union campaign." (Tr. 1058.) Ellis also informed employees that, no matter what happened, Terex would not agree to a pension plan with the Boilermakers. (Tr. 1062.)

Near the end of his speech, Ellis went to pains to tell employees that managements' jobs would not be affected by the results in the election: "But I will say, you know, whatever the outcome is, we're going to be fine. Terex is a big company, the management team in here will be fine, we're not going to make any changes because of this." (Tr. 1063.) In contrast, Ellis offered no such job

assurances to employees, Tr. 1080–81, only assuring them that Respondent "will not close this facility in the next day or any time in the near future." (Tr. 1063.)

In addition to this meeting with assembly employees, Ellis held another meeting that day with other production departments—excluding the unionized paint department. (Tr. 925, 967, 1073.) Curiously, although there was no petition filed with these employees, Ellis repeated the threats that were made to the assembly employees. (Tr. 925, 968–69.) The only difference between the two meetings was that Ellis did not talk specifically about employees voting at the second meeting. (Tr. 1065.)

In addition to these captive audience meetings, Respondent's lower-level managers launched an all-out assault on assembly employees the day before the election, peppering them with questions about their union sentiments and threats about what would happen if the Union came into the facility. Curiously, these managers came from departments *other* than the assembly department in which employees were voting.

One of the employees visited most often by managers was assembler Bill Broking. According to Broking, and several other employees who were near Broking that day, at least four managers approached Broking that day to discuss the Union: Bill Wake, Director of Engineering; Buck Storlie, Test Track Supervisor; Nancy Dahlgren, Shipping and Warehouse Supervisor; and Lori Gill.[3] (Tr. 563–65,

[3] Broking also remembers being approached by Joan Hoeschen that day regarding the Union. (Tr. 601.) As this conversation is cumulative with the other violations

599–02, 971–78, 2012–13.) Wake began the assault by asking Broking what he thought about the Union, and told Broking that he was concerned that the facility would close or move if the Union won the election. (Tr. 599, 973.) Storlie also questioned Broking about Broking's union sentiments, and told Broking that he feared that the plant would move if the Union came in. (Tr. 600, 976–77.) Dahlgren similarly asked Broking about his union sentiments and told him that "if they get a union in here, you know, this place will close or move." (Tr. 601, 974–75.) Gill also asked Broking about whether he supported the Union. (Tr. 601–02.) These conversations were so frequent and disruptive, according to Broking, that they made it difficult to work that day. (Tr. 602.) According to temporary assembler Mike Kossow, who was working next to Broking, many of these managers proceeded to talk to other employees after they finished speaking with Broking. (Tr. 971–78.)

Managers also approached Assemblers Miranda Clark, Greg Payne, and Doris Olson to discuss the Union the day before the election. Specifically, Dahlgren approached these employees and told them that "if you guys do vote the union in, they will close the place down and I don't want to have that go on." (Tr. 631–32.) Storlie also visited these employees, and told them that if the union comes in this place, they will shut it down. (Tr. 633–34.) After Storlie finished talking to these employees, he walked off and started talking with other employees in assembly. *Id.*

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involving Broking and is not pled in the complaint, it will not be argued as a separate violation in this brief.

Warehouse Manager Nancy Dahlgren similarly visited assembly lead Nick Baker to discuss the Union around the time of the assembly election. According to Baker, Dahlgren approached him in the receiving area of the assembly department. During this conversation, Dahlgren told Baker that he should vote no because a plant she had worked at in her prior job had a union come in, that it messed everything up, and that the plant had closed down. Dahlgren also asked Baker why he was interested in the Union; Baker tried to be non-specific, and brought up some issues with another employee that frustrated him. (Tr. 995–96.)

On June 25, employees in the assembly department voted against union representation, 15–22, despite their previously expressed majority support for the Union as demonstrated by the authorization cards.

The day after the election, Respondent announced the termination of seven welders and three painters (discussed in more detail below). After this election loss and these terminations, Paint Lead Esler visited Hoeschen in her office to clear the air. During this conversation, Esler explained to Hoeschen that he had voted for the Union to "stick up for his guys." In response, Hoeschen told Esler "We'll see how that works out for you," and as Esler was leaving, said "[G]ood luck with that." (Tr. 693–94.)

Despite the loss of the assembly election and the decimation of the paint department, the Union has continued to remain interested in organizing employees. It has continued to hold meetings, mailed flyers to employees, and engaged in house visits. Unsurprisingly, given Respondent's response to the union organizing efforts

in the spring and summer, Respondent's employees have not filed another election petition.

D. Termination of Employees in the Aftermath of the Union Elections

After the election petitions were filed, around the time that it began campaigning in earnest against the Union, Respondent's managers began meeting to discuss potential terminations at the plant. The initial meeting to discuss these terminations occurred on June 2. (RX 69.) DiBiagio, Hoeschen, Schultz, Gravelle, and Gill were in attendance at this meeting. *Id.* At this meeting, the managers discussed potential terminations, but did not reach a final decision. (Tr. 1824.) Hoeschen, during the course of this meeting, first brought up the idea of using a "cross-training" matrix that she had already created in the welding and fabrication department for determining who should be terminated. (Tr. 343.) At this time, Hoeschen testified that the managers knew they "had a couple of weeks" to make a decision on the terminations—exactly when the first election in the paint department was scheduled on June 18. *Id.*

Around the same time, Respondent began a rapid effort to outsource paint department work. These same managers—minus Deb Schultz—met to discuss these outsourcing plans on June 5—less than two weeks before the paint department election. (GCX 97.)

At some point between the June 2 meeting and June 16, Respondent allegedly decided to terminate at least some employees. (Tr. 1826.) At this time, Respondent claims that no decisions were made on *who* would be terminated or *how many* employees would be terminated. *Id.* It is unclear who exactly was involved in

this decision or when the decision was made to terminate employees. On June 16, only two days before the paint election, however, these efforts began in earnest. At this time, Hoeschen provided a matrix that she had created for the paint department, along with the welding and fabrication matrix. (Tr. 365–66.) Schultz and DiBiagio held meetings with each other several times between June 16 and 17, where they discussed the termination of employees. At these meetings, they finalized who would be terminated, and from what departments. Additionally, while they allegedly left the welding matrix unmodified, they manipulated the numbers in the paint matrix by adding (and subsequently taking out) seniority, and weighting the skills in the paint department. (Tr. 398–99, 404, 414, 1670–71, 1898–99.)[4]

On June 17, starting at about 5:00 pm, Respondent's managers and executives began feverishly exchanging emails regarding the layoffs. (GCX 13.) Over the course of these exchanges, Respondent allegedly exchanged various versions of the skills matrices for the welding and paint departments and an undated narrative account of the layoffs. *Id.* At 9:03 pm, Ellis approved the terminations, which were scheduled to take place on June 26 and August 14. *Id.* In total, Respondent planned to terminate 7 welders and 3 painters on June 26, the day after the assembly election; and three more paints on August 14.

On June 24, the day before the assembly election, Respondent held another captive audience meeting with the assembly employees. At this meeting,

[4] The testimony on these matrices was generally confused, and will be discussed in more depth in the analysis below.

Respondent told the assembly employees that the paint department employees had "taken a big gamble" by choosing to be represented by the Union. Respondent implored the assembly employees to "sit back and see what happens in real life to employees who choose to be represented by a Union"—after it had made the decision only days earlier to terminate over half the paint department. GCX 12 at 11.

On June 26, the day after the assembly election, Respondent's managers held a meeting with the welding and fabrication employees who were being terminated. There on behalf of management were Deb Schultz, Jim DiaBiagio, Dallas Gravelle, and Joan Hoeschen; for employees, Tony Knight, Tony Erickson, Vicky Burton, Rory Sisco, and Mike Kossow were present. At this meeting, Schultz told the employees that they were being terminated because work was slow in the department. (Tr. 963.) Several employees objected, and said that their work was not slow. (Tr. 964.) Schultz then proceeded to take the employees through their severance packages, and the terminated employees were escorted out of the plant. (Tr. 965.) No reference was made to any zinc issues or outsourcing at this meeting.

That same morning, Respondent held a similar meeting with the painters who were being terminated. In this meeting for management were Deb Schutlz, Jim DiBiagio, Dallas Gravelle, and Joan Hoeschen. For painters, it was Dale Persson, Dennis Feltus, and Jesse Schminski. (Tr. 761.) At this meeting, DiBiagio explained that the reason for the termination was a lack of orders. He did not

mention zinc or the outsourcing. At the end of this meeting, Schultz went over the severance agreements with the painters. *Id.*

On August 14, Respondent implemented the second round of terminations in the paint department. The terminated employees at this meeting were Kerry Esler, Lee Kostal, and Rick Andrews. The managers at this meeting were DiBiagio, Schultz, and Hoeschen. At this meeting, DiBiagio told the employees that they were being let go because of a lack of work. (Tr. 682–85, 781–85, 840–44.) Again, there was no reference to outsourcing or the zinc issues. In response to this, Andrews told DiBiagio that Respondent's skills matrix (which the Union had heard about during effects bargaining) was "bullshit." (Tr. 784–85.) At the time of their terminations, Kostal and Andrews were the only two employees on the Union's bargaining committee in the paint department. (Tr. 799, 825.)

III. ANALYSIS

The General Counsel will first address the serious threats and other 8(a)(1) allegations contained in the complaint. General Counsel will then discuss the terminations and outsourcing at issue here, establishing the General Counsel's positive showing of discriminatory motive and then refuting Respondent's process and justifications for the unlawful actions. After discussing these issues, the General Counsel will next address the suspicious changes in assignment for certain employees from welding/fabrication to assembly. Then, the General Counsel will establish the appropriateness of a *Gissel* bargaining order based on Respondent's "hallmark" violations of the Act and the Union's previously-established majority support. Finally, the General Counsel will briefly discuss why the charges should not be deferred to the private parties' settlement agreements.

A. Respondent's Violations of Section 8(a)(1) of the Act

1. General Principles Applicable to this Case

Under well-established Board precedent, the test for determining whether a statement unlawfully interferes with employees' Section 7 rights in violation of Section 8(a)(1) is an objective one. In order to determine whether a statement is objectively unlawful, the decisionmaker must make an assessment of all circumstances in which a statement is made. *Mediplex of Danbury*, 314 NLRB 470, 470–71 (1994). Although an employer is allowed, under Section 8(c) of the Act, to make certain statements to employees, these statements must be free of "threats of reprisal or promises of benefits." 29 U.S.C. Section 158(c). In determining whether a statement rises to an unlawful threat, the decisionmaker must keep in mind the

labor relations setting, which involves the unique dependence of employees on their employer for their livelihood. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–18 (1969).

The seminal case addressing the line between permissible campaigning and unlawful threats is *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In defining whether an unlawful threat has been made, the Court established the following test:

> [An employer] may make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, a prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in the case unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Id. at 618. Thus, while an employer is free to predict consequences based on objective facts, it cannot predict adverse consequences without an objective basis, or predicate those consequences on factors within the employer's discretion.

As aptly stated by the Eighth Circuit: "A threat to close the plant, when made in the context of the union organization of the employees, has long been recognized as one of the most potent instruments of employee interference with the right of employees to organize under the National Labor Relations Act." *Chemvet Laboratories, Inc. v. N.L.R.B.*, 497 F.2d 445, 448 (8th Cir. 1974) (citations omitted);

see also Sheraton Hotel Waterbury, 312 NLRB 304, 305 (1993), *enforcement denied*, 31 F.3d 79 (2d Cir. 1994).

In applying these standards to the misconduct at issue here, the General Counsel will first address the statements made at the DiBiagio meeting; will then address the Ellis meetings with the assembly and other production employees; and will finally address the individual conversations that occurred between various mid-level managers and production employees around the time of these meetings.

2. The DiBiagio Meeting

A general review of DiBiagio's speech (GCX 11) reveals the extremely negative view that Respondent has adopted towards employees' union activity. Employees in attendance at this meeting could not help but draw the conclusion that this meeting was in retaliation for the painter's vote the previous day, and that if Respondent was willing to speak to employees in an unprecedented manner, it was likely willing to carry out these unprecedented threats. This impression was reinforced by the manner and language used by DiBiagio during his speech, both of which were unprecedented.

The pernicious atmosphere of this meeting only enhances the unlawful statements made therein. At this meeting, DiBiagio repeatedly threatened employees with job loss in retaliation for their support for the Union. (GCX 11 at 10, 12, 13; Complaint ¶7(d),(f).). In the context of these hallmark threats, DiBiagio referenced the fact that most of Terex's union plants had closed, and that he personally had been involved in these closings. (GCX 11 at 11; Complaint ¶7(d),(e).) DiBiagio also made vague references to supposed instances where the Grand Rapids

plant had been in danger of being sold or shut down. GCX 11 at 9–10; Complaint ¶7(d).) Driving home what was at stake in the upcoming election, DiBiagio closed by telling employees: "I hope you all are smart enough not to follow suit and make the same mistake because what you decide *will determine* the future direction of the business." (GCX 11 at 13; Complaint ¶7(d).) (emphasis added)

The Board and courts have consistently held that statements connecting the survival of a business to employees' decision to vote for a union are hallmark violations of the Act. *NLRB v. Mark I Tune-Up Centers, Inc.*, 691 F.2d 415, 416–17 (8th Cir. 1982); *Chemvet Laboratories, Inc. v. NLRB*, 497 F.2d 445, 448 (8th Cir. 1974); *Contempora Fabrics, Inc.*, 344 NLRB 851, 851 (2005). The Board has also held that references to other plants that have closed, in the context of a discussion regarding the potential closure of the employer's own facility, are unlawful. *Homer D. Bronson Co.*, 349 NLRB 512, 512–13 (2007) (discussion of other union plants owned by employer that had closed because of union unlawful), *enforced*, 273 F. App'x 32 (2d Cir. 2008); *see also Marcar Industrial Uniform Co.*, 306 NLRB 27, 28 (1992). Here, DiBiagio's statements invariably led to the conclusion that if employees brought in a union, Respondent would close its doors.

The fact that these statements do not explicitly state that the plant will close in response to union activity does not shield them. The Board has consistently held, in much more ambiguous circumstances than those present here, that veiled references of this nature are implicit and hallmark threats of plant closure. *Amptech Inc.*, 342 NLRB 1131, 1135 (2004), *enforced*, 165 F. App'x 435 (6th Cir.

2006) (statement that employer would "keep options open with respect to the future" unlawful threat of closure). This is particularly the case given that, after the meeting, other supervisors explicitly told employees that if the union were voted in, the plant would close. *See* discussion *infra* pp. 28–33. The statements also are not protected under *Gissel*. Although some vague facts are referenced prior to these statements, these facts are not connected to the closure of the plant and subsequent job loss. *Cf. Smithfield Foods, Inc.*, 347 NLRB 1225, 1227 (2006) (employer specifically connected facts of other plant closures to statement that union could not prevent its plant from closing).

DiBiagio further peppered his presentation with statements about how the Union organizing campaign had damaged Respondent, and would lead to further unspecified damage if employees voted for the Union at the election. (GCX 11 at 3,4; Complaint ¶7(a),(b).) DiBiagio also told employees that to him, trust was everything, and because they had brought in a union, he could no longer trust them. (GCX 11 at 5; Complaint ¶7(c).)

Statements of this nature—characterizing unionization as inherently damaging or an attack on the employer—have been held by the Board and the courts to be unlawful in similar contexts. *See, e.g., Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98, slip op. at 1, n.3, 16 (2013), *reaffirmed*, 361 NLRB No. 130 (2014); *Sawgrass Auto Mall*, 353 NLRB 436, 437–38 (2008); *Amptech Inc.*, 342 NLRB at 1135; *Framan Mechanical, Inc.*, 343 NLRB 408, 410 (2004) (statement that employer could no longer trust employees because of their support for union

violated Section 8(a)(1)). Further, to the extent these statements predict adverse effects for employees going forward, they are not based on objective fact and thus are unlawful under *Gissel Packing Co.*

3. The Ellis Meetings

The subsequent meetings with company executive George Ellis drove home the message delivered by DiBiagio. The context of the Ellis meetings, as with the DiBiagio meeting, provides essential background to judging the lawfulness of his statements. Ellis is the head of Terex's construction division, and serves as DiBiagio's manager. His meetings occurred just days after the DiBiagio meeting, and occurred in the same location as the earlier DiBiagio meeting. Ellis also was a rather infrequent visitor to Respondent's plant, and this was in fact his first visit to in 2014. Additionally, although one might be tempted to characterize Ellis's presence as damage control after the DiBiagio meltdown, his own statements indicate otherwise. Indeed, Ellis explicitly told employees that he fully supported DiBiagio and the other managers.

One of the major themes of the Ellis meetings was reinforcing to employees that Terex had closed union facilities in the past. (Complaint ¶7(i),(m).) Under the precedent discussed above, these statements are hallmark violations of the Act. The impact of these statements were further driven home by Ellis's reference to other plants owned by Respondent in Oklahoma and Indiana that had the capacity to perform the work currently performed in Grand Rapids. (Complaint ¶7 (l).) *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1037–39 (8th Cir. 1976).

These threats are only exacerbated by Ellis's statements about control of the work. He repeatedly emphasized to employees that *he* was in control of where the work of Respondent would be performed, and that in the past Respondent had shut down its union facilities. (Complaint ¶7(j),(k),(m),(n),(o).) In the context of *Gissel Packing Co.*, this removes the statement from the protection of Section 8(c). The Court there held that a statement predicting adverse future consequences was lawful only if it is "tied to circumstances beyond [an employer's] control." 395 U.S. at 618. Here, Ellis did not tie the relocation of work to circumstances beyond his control; rather, he emphasized that *he* was the one who had the control of where work was performed, and further implied to employees that his decision regarding where work was going to be performed depended on the results of the union election.

Ellis's reference to "flexibility" as the deciding criterion in determining which facilities remain open does not protect his statement under *Gissel Packing Co*. Ellis simply used the term "flexibility" as a euphemism for non-union facilities, while in turn defining union facilities as "inflexible." The "flexible" facilities remained open, and took work from the "inflexible" facilities, which were closed. Ellis, however, provided no objective explanation of what he meant by "flexible" facilities—what it was about the non-union facilities that made them flexible—other than the fact that they were non-union. Similarly, with respect to the union facilities, Ellis provided no explanation as to what it was about these facilities that made them inflexible—other than the fact that they were union. (Tr. 1058–60.) Ellis posited the following

scenario to the unorganized employees: vote for a union, become "inflexible," and face job loss at his discretion; or stay non-union, remain "flexible," and continue to receive work from Terex.[5] This type of threat is *exactly* the type of statement that *Gissel* defines as unlawful. *See, e.g., Quamco, Inc.*, 325 NLRB 222, 222–24 (1997) ("UAW Wall of Shame" listing UAW plants that had closed unlawful under *Gissel*.) Indeed, the Board has recently and repeatedly held that vague statements related to "flexibility" do not provide an objective basis under *Gissel* and do not address the fact that the consequences are beyond an employer's control. *DHL Express, Inc.*, 355 NLRB 1399, 1399 (2010); *American Girl Place*, 355 NLRB 479, 488 (2010); *DMI Distribution of Delaware, Ohio, Inc.*, 334 NLRB 409, 409, 419 (2001) (statement that Union would impinge on "flexibility" and necessitate plant closure "crossed the line" under *Gissel*).[6]

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[5] Indeed, Respondent reiterated that it needed to stay "flexible" in the captive audience meeting with assembly employees the day before the election. GCX 12 at 9 ("We need *flexibility* to satisfy our Customers.") (emphasis added) (case connecting loss of business to unionization is unlawful)

[6] The instant case is readily distinguishable from *Smithfield Foods, Inc.*, 347 NLRB 1225 (2006) (Liebman dissenting) where the Board held that references to the fact that three previous occupants of the employer's facility all closed after being organized were lawful. In making this finding, the Board relied on the fact that the employer did not make any future predictions about what would happen in the instant case, and further did not speculate as to what caused the previous companies to go out of business. Here, by contrast, Respondent specifically stated that it was the "inflexibility" of its union facilities that caused them to close. Perhaps more importantly, and emphasized by Ellis, *he* controlled where the work went amongst Terex's construction group. As recognized in *Gissel*, a lawful prediction must be carefully tied to "demonstrably probable consequences beyond [Respondent's] control." The fact that Respondent controlled where work went, and indeed emphasized this fact to employees as it discussed which plants Respondent chose to close, removes these threats from the mere recitation of historical facts that

In addition to his statements regarding what would happen to the work at the Grand Rapids plant if the Union were successful, Ellis also made a point to inform the assembly employees that if the union were successful, he would not negotiate. (Complaint ¶7(q).) Ellis, by his own admission, informed employees explicitly and unequivocally that Terex would not, under any circumstances, agree to a pension plan with the Union. (Tr. 1062.) The Board has held that statements indicating that an employer would not negotiate in good faith are unlawful. *See, e.g., Redwing Carriers, Inc.*, 165 NLRB 60, 83 (1967); *see also Fisher Island*, 343 NLRB 189, 189–90, *enforcement denied*, 140 Fed. App'x 857 (11th Cir. 2005). The same result should follow here.

Finally, although not alleged in the complaint, Ellis also admitted to making a threat connecting a future loss of benefits to employees' union activity. Ellis told employees that Respondent was "considering a payout for a bonus scheme," but that "this [union campaign], you know, could hinder that from the cost of this activity." (Tr. 1058.) Statements connecting the loss of benefits to a union campaign are similarly unlawful. *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 564–65 (2005) (statements attributing loss of potential benefits to union campaign unlawful).

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was relied on by the Board in *Smithfield Foods, Inc.* *See also Michael's Markets*, 274 NLRB 826, 826 (1985) (letter referencing closure of other plants lawful because "[t]he Respondent Employer merely distributed a letter in which *an employee of another company* recounted his personal past experience in a unionized environment.") (emphasis added).

To rebut these statements, and in particular the threats of plant closure discussed above, Respondent will likely point to a statement that Ellis made about "not closing this facility the next day or any time in the near future." (Tr. 1063.) This statement should be discounted. First, the vast majority of the assembly employees who testified regarding this meeting did not remember such a statement being made. (Tr. 2008–2013.) Second, Ellis's own account of his speech places this statement in the context of other statements where he told employees that the *management* would be fine without giving *employees* similar assurances of job security. (*Compare* Tr. 1063 with Tr. 1080–81.) Third, to the extent assurances were given to employees regarding the plant not closing, a one sentence assurance—in the context of Ellis's lengthy exposition on "flexible" versus "inflexible" facilities, DiBiagio's meltdown only days earlier, and the assault by Respondent's lower-level managers the day before the election—rings hollow. And, as a legal matter, this statement falls far short of meeting the requirements under *Passavant* to remedy the prior unlawful statements, as it is an ambiguous statement, accompanied by other unlawful conduct and *unaccompanied* by any assurances regarding Section 7 rights. *Passavant Memorial Hospital*, 237 NLRB 138, 138–39 (1978).

4. Individual Conversations Between Supervisors and Employees

In addition to the broad net cast at the DiBiagio and Ellis meetings, Respondent directed targeted threats of closure toward certain individuals in the bargaining unit. These threats occurred in the aftermath of the DiBiagio and Ellis meetings—the majority occurring the day before the assembly election. The supervisors who spoke with the assembly employees were not the normal

supervisors for these employees, and in fact many of them had never even spoken with assembly employees before. In these conversations, which took place on the shop floor, supervisors repeatedly approached employees while they were working, to the extent that it was difficult for employees to perform their normal job duties. (Tr. 602.) Respondent's managers threatened employees that the plant would close if they voted for the Union and interrogated them regarding their union sentiments. After speaking with the specific employees alleged in the complaint, many of these managers went on to talk to other employees. (Tr. 974–75.) This concerted course of conduct, coupled with the earlier captive audience meetings, reveals Respondent's frankly incredible animus towards its employees' protected union activities.

The record testimony establishes four specific sets of unlawful conversations between managers and assembly employees: the Lake conversation with Dahlgren; the Broking conversations with various managers; the Payne, Clark, and Olson conversations with Dahlgren and Storlie; and the Baker conversation with Dahlgren. They will be addressed *seriatim* below.

i. Lake's encounter with Dahlgren

Lake's account of his conversation with Shipping Manager Nancy Dahlgren in the immediate aftermath of DiBiagio's June 19 meeting contains clear interrogations and threats in retaliation for employees' union activity. (Tr. 617.) Dahlgren opened the conversation by asking Lake what he thought of DiBiagio's captive audience meeting. Under the totality of the circumstances, this question constituted unlawful interrogation. The underlying captive audience meeting concerned union activity and was focused on the consequences towards assembly

employees if they supported the Union. The one-on-one conversation between Dahlgren and Lake occurred immediately in the aftermath of DiBiagio's ULP-laden tirade, and was accompanied by threats of closure from Dahlgren. Dahlgren initiated this conversation, and was not Lake's normal supervisor or otherwise on friendly terms with Lake. Given this context, Dahlgren's questioning of Lake violated Section 8(a)(1) of the Act. *See, e.g., Hoffman Fuel Co.*, 309 NLRB 327, 327 (1992) (questioning about union sentiments unlawful when accompanied by threats).

Dahlgren accompanied this questioning by implying that if the Union were voted into the facility, Respondent would close its doors. Dahlgren did not provide any objective basis for this statement, nor did she tie the closure of the plant to circumstances outside Respondent's control.[7] Accordingly, this statement is an unlawful threat under *Gissel Packing Co.*, *supra*.

ii. Broking encounters with various managers

One of the main targets of Respondent's managers was assembler Bill Broking. According to Broking, and corroborated by his co-workers Mike Kossow, Steve Peterson, and Nick Baker (Tr. 563, 971–98, 2012), he was approached by at least four managers on the day before the election, all of whom threatened that adverse consequences would result if the Union were voted into the facility.

[7] Respondent called Dahlgren in an attempt to rebut this conversation. However, her characterization of the events in question only reinforces that an unlawful threat of closure was made, as she admits that she told Lake that she had been in a union before, and that if the union to Respondent came in she would be worried about her job. (Tr. 1228–29.)

Several managers approached Broking and unlawfully interrogated and threatened him. One of the first managers to approach Broking that day was Buck Storlie. (Tr. 563, 600, 976, 2012.) According to Broking, Storlie (who supervised a test track about three miles away from Respondent's main facility) had never spoken with him before. (Tr. 600.) That day, however, Storlie approached Broking and asked him what he thought about the Union; after Broking replied, Storlie told him that "he didn't think [the Union] would be a good idea, and that he feared that the plant would move . . . if the union came in."[8] *Id.* Warehouse manager Nancy Dahlgren also approached Broking that same day. (Tr. 601, 974.) Dahlgren asked Broking what he thought about union, and after he answered her question, told him that "If they get a union in here, you know, this place will close or move."[9] (Tr. 601.) These threats, and accompanied questioning, violate Section 8(a)(1) of the Act. *Gissel Packing Co., supra*; *Hoffman Fuel Co.*, 309 NLRB at 327.

Other managers also interrogated Broking about his union sentiments the day before the Union election. Specifically, managers Bill Wake and Lori Gill

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[8] Storlie's denial of these statements should not be credited. In contrast to his generally coherent testimony on direct, Storlie was evasive, and at times nonsensical in his response to questions by General Counsel. For example, when pressed by the General Counsel on whether he was instructed to talk to production employees about the Union, Storlie testified as follows:

> Q: So no manager or no supervisor ever talked to you about going down on the floor and talking to people about the union?
>
> A: If they did, I don't know who it was. (Tr. 1193.)

[9] Dahlgren's account of this conversation generally corroborates Broking's account. Tr. 1226–27.

questioned Broking regarding his thoughts about the Union.[10] (Tr. 600–02, 973, 975–76.) Wake and Gill, like several other managers discussed above, rarely spoke to Broking. (Tr. 600.)[11] In the context of the other unfair labor practices here, and specifically the other interrogations, their questioning of Broking's union sentiments was unlawful. *See, e.g., Medcare Associates*, 330 NLRB 935, 939–40 (2000) (totality of circumstances analysis requires weighing of *all* instances of interrogation when determining coercive effect).

iii. Payne, Clark, and Olson encounters with Dahlgren and Storlie

Dahlgren and Storlie also made similar threats to assembly employees Doris Olson, Miranda Clark, and Greg Payne. According to assembler Justin Wiese, who was standing about 10 feet away from these employees during these conversations, Dahlgren approached these three employees, started talking about her career, and told them, "Well, if you guys do vote the union in, they will close the place down and I don't want to have that go on."[12] (Tr. 632.) After Dahlgren finished this conversation, Storlie then approached these employees and told them to vote no

[10] Wake, when questioned on this point by Respondent's attorney, admitted that he could not recall specifically whether he questioned Broking about his union sentiments. (Tr. 1210.)

[11] Gill's evasiveness and selective memory loss when testifying regarding this conversation on cross means that her testimony that she "did not say anything unlawful" should not be credited. (Tr. 1469; *see* Tr. 1467–69.)

[12] Dahlgren admits that, to the best of her recollection, she mentioned her previous experience with unions causing her former workplace to close. (Tr. 1229.)

because if "the union comes in this place, they will shut it down."[13] (Tr. 633.) These conversations constitute unlawful threats under the precedent discussed above.

iv. Baker's encounter with Dahlgren

Around that same day, Warehouse supervisor Dahlgren also threatened and interrogated Undercarriage lead Nick Baker. (Tr. 995–96; *see also* Tr. 565.) According to Baker, Dahlgren approached him while he was working in the receiving area and told him that he should vote no because "the plant that she worked at prior to her job had got a union in there and it messed everything up and they closed down." (Tr. 995.) After making this statement, Dahlgren then questioned Baker about his union sentiments; Baker responded in a non-commmittal way.[14] *Id.* As with the above conversations, these threats and questions on the eve of the assembly election violated Section 8(a)(1) of the Act.

v. Esler's post-election encounter with Hoeschen

In addition to these threats with the assembly department employees, Respondent's Paint Manager Joan Hoeschen threatened Paint Lead Kerry Esler.[15]

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[13] For the reasons discussed above in footnote 8, Storlie's testimony on this point should not be credited.

[14] Dahlgren testified vaguely that she generally remembers talking about how her prior employer had shut down after the union came in, but did not testify about questioning Baker regarding his union sentiments. (Tr. 1227–28.)

[15] Hoeschen also threatened Esler prior to the election, as discussed *supra* in the facts section. Given the cumulative nature of these threats, General Counsel will not be amending the complaint specifically to allege these threats as unlawful; however, they do provide evidence of Respondent's general animus, and in particular the specific animus that it bore towards Esler as the lead in the paint department.

After the paint election, and the first round of paint layoffs, Esler visited Hoeschen's office to "clear the air" with her. Esler opened the conversation by explaining why he had supported the Union. In response, Hoeschen told him that "We'll see how that works out for you."[16] (Tr. 693–94.) In the context of Respondent's clear animus towards the Union, this statement constitutes an unlawful threat of unspecified reprisal. *Leather Center, Inc.*, 308 NLRB 16, 27 (1992) (statement that employee should "be careful" in context of union activity constituted unspecified threat of reprisal).

5. Summary of Section 8(a)(1) Violations

In conclusion, the record evidence demonstrates that Respondent's highest managers repeatedly threatened assembly unit employees at captive audience meetings on the eve of the union election that if they voted for the Union, they would lose their jobs. Not content to let these broad threats stand on their own, Respondent's lower-level managers echoed these threats in individual conversations with employees. These pervasive threats paint a backdrop of extreme anti-union

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[16] Hoeschen's account of the beginning of this conversation is frankly incredible:

> On the day of the first layoff, which was June 26th, he came into my office and he -- it was in the morning -- and he said, "It must have been a tough morning for you." And I said, "It was a terrible morning for me." *And he said, "I could see that, by the people you let go, it was based on skills." And I said, "Yes, it was."* (Tr. 1728.) (emphasis added)

The reason this account is incredible is that Esler expressed significant *disagreement* with who was laid off and the ratings on the skills matrix. (*See* Tr. 664–70.) Hoeschen's self-serving testimony to the contrary should be disregarded, and casts doubt on her entire account of this conversation.

animus, a backdrop on which all of Respondent's terminations and personnel decisions around the election must be considered.

B. Respondent's Violations of Section 8(a)(3) of the Act

1. General Principles Applicable to this Case

In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Wright Line*, 251 NLRB 1083, 1089 (1980), enforced on other grounds 662 F.2d 899 (1st Cir. 1981).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. 393, 401 (1983) ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

2. The General Counsel Has Established a Strong Initial Showing Under *Wright Line*

Here, the General Counsel has established a strong showing of unlawful motive under *Wright Line*. Respondent's employees engaged in protected activity by seeking to organize with the Union, and Respondent undisputedly had knowledge of this protected activity. Respondent, by its own admission, only began planning these terminations *after* it had knowledge of employees' protected activities.

In response to this activity, Respondent committed numerous 8(a)(1) violations by threatening employees with termination, plant closure, and other adverse consequences at captive audience meetings. In addition to these widely cast threats, Respondent's lower level-managers issued targeted threats to employees throughout its plant. These statements have been discussed extensively above, and need not be repeated here. The presence of numerous severe and independent 8(a)(1) violations—the majority of which occurred within a week of the terminations at issue here—establishes the animus necessary to sustain the General Counsel's case.

Respondent's extreme anger towards its employees union activity is perhaps best exemplified in the DiBiagio meeting with the assembly department that occurred the day after the paint election. According to all the employees who testified, DiBiagio's anger at that meeting was readily visible, with one employee stating that he was so mad it looked like he was going to have a heart attack. (Tr. 628.) The language that DiBiagio used, including telling the assembly employees that it was "unfuckin believable" that they were trying to join a union, drives home

Respondent's sentiments. (Tr. 119) (DiBiagio admitting that he normally doesn't use profanity). This vitriolic display from the highest-ranking manager at Respondent's facility—not coincidentally, the decision maker for the terminations at issue here—casts extreme doubt on any proposed neutral justification for Respondent's actions.[17]

Respondent's connection of the terminations to the Union campaign was made explicit by DiBiagio in his last anti-union presentation to employees the day before the assembly election on June 25. In that presentation, DiBiagio showed employees a series of slides entitled "The Paint Department's Big Gamble." In these slides, DiBiagio told the assembled employees:

- Last week the Paint Department decided they wanted to "roll the dice"

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- You don't have to take that same "leap of faith"
- You have the benefit of watching to see what happens with the Paint Department
- *You can sit back and watch in real life what happens to employees who vote for a union.*

GCX 12 at 10–11 (emphasis added). These statements were made *only days after* Respondent had made the decision to terminate six of the eleven paint department

[17] Respondent's extreme reaction to its employees' union activity also bore out in the amount of money that it spent combating its employees' union activities. DiBiagio admitted that Respondent spent several hundred thousand dollars fighting the Union even before the instant unfair labor practice hearing. More importantly, Respondent wielded this figure as a weapon, telling employees repeatedly how much money the Union campaign had "cost" the company. (Tr. 110–11; GCX 53(b) at 2–3.)

employees.[18] Respondent's motivations are thus laid clear: Respondent wanted to use these terminations to show "in real life what happens to employees who vote for a union," in order to discourage future organizing by Respondent's employees.

The timing of these terminations drives home that they were unlawfully motivated. Respondent, by its own admission, only began planning for these terminations *after* its employees filed election petitions in the paint and undercarriage units. (Tr. 1824–26.) It then rushed to finalize and justify the terminations as the union elections approached—including engaging in an unprecedented and hasty effort to outsource numerous products previously painted at the facility. *See* discussion *infra* pp. 110–11. These termination decisions were finalized at 9:03 pm on the night before the paint election, and the vast majority were carried out the day *after* the paint unit was certified as those employees' collective bargaining representative. (GCX 13.) To contend that the timing of these decisions was not driven by employees' union efforts and the upcoming elections—that Terex's President of Construction was approving these terminations at 9:03 pm on the eve of the first union election by chance (GCX 13); that Respondent was telling contractors that it was "under the gun" to get parts

[18] DiBiagio's claim that these statements were generically related to the risks associated with collective bargaining should not be credited. (Tr. 1676–79.) First, as pointed out on cross-examination, DiBiagio does not connect any of these vague threats to the collective-bargaining process. Second, these threats occurred only days after the fevered exchanges regarding the paint department terminations on June 17. Finally, DiBiagio's animus towards employees' union activity, as expressed in his June 19 meeting, suggests that he intended the statements to have a great impact than a benign reference to the risks associated with collective-bargaining.

outsourced in early June by mere happenstance (GCX 67); that Respondent had "a couple of weeks" to terminate employees after it began meeting in early June to discuss layoffs was mere coincidence (Tr. 343)—is simply ludicrous. Respondent's actions paint a clear picture that it began considering terminations after its employees started organizing, and that it rushed to implement these decisions ahead of the union election and any potential bargaining obligation. Such activity is unlawful. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991).

Respondent's abundant animus and the extremely suspicious timing of these terminations places a heavy burden on Respondent to demonstrate that it would have terminated these employees absent their union activity under *Wright Line*. *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 277 (2008), *affirmed*, 357 NLRB No. 16 (2011), *enforced*, 700 F.3d 1 (D.C. Cir. 2012) (citing *Eddyleon Chocolate Co.*, 301 NLRB 887) ("Where, as here, the General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination.") As will be addressed below, Respondent will be unable to satisfy this burden, as it utilized a flawed and ad hoc method in selecting employees and its asserted business downturn and outsourcing, related to a long-standing zinc pollution issue, do not explain its decision to terminate employees. Accordingly, these terminations are unlawful.

3. Respondent's Defenses Are Insufficient to Meet Its *Wright Line* Burden

i. Respondent's matrices used to select employees do not represent an honest attempt to terminate employees based on their skills

In order to implement its suspiciously timed terminations, Respondent chose to ignore objective metrics, existing performance reviews, and feedback from its designated quality department. Rather, Respondent relied on two "skill" matrices—one for paint, and one for welding/fabrication—that were created primarily by Paint and Weld/Fab supervisor Joan Hoeschen. A cursory review of these matrices, and the testimony supporting them, reveals their flawed and ad hoc nature. Looking at these matrices in depth, however, demonstrates that they were arbitrary and pretextual tools designed to paper over Respondent's animus-driven layoffs. This section will first examine the Paint matrix, both the circumstances of its creation and the numbers contained therein. Next, this section will address the welding and fabrication matrix in a similar matter. Finally, this section will address the manner in which the matrices targeted several highly skilled and prominent union supporters who were terminated.

a. The paint matrix

In making the decision to terminate six out of the eleven painters (55 percent) it employed prior to the Union election, Respondent claims to have relied on a matrix created by Joan Hoeschen. This decision, however, appears to be completely pretextual for the following reasons:

- First, Respondent's managers supposedly involved in this decision—namely, Hoeschen, DiBiagio, Schultz, Dallas Gravelle, and Lori Gill—give contrary

accounts of what occurred and who was actually involved in the termination decision.

- Second, Hoeschen did not have any experience or skill in paint, and was unable to define the rankings that she created to terminate employees.
- Third, Respondent did not involve its lead—the employee who ran the paint department and was in the best position to rate the employees who worked in the department—or the designated quality department.
- Fourth, the testimony of the employees who worked in the paint department belie the ratings given to the employees, particularly Respondent's election observer, Mitch Johnson.
- Fifth, even crediting Hoeschen's ratings, these numbers were further manipulated in inexplicable ways by Deb Schultz and Jim DiBiagio—two managers far removed from the paint process.

Joan Hoeschen, Deb Schultz, and Jim DiBiagio all testified, on two different occasions, about the chronology of events in the weeks leading up to the elections and terminations. Their accounts of these events are incomplete, contradictory, and irrational.

Respondent's witnesses treated the terminations at issue here as a hot potato, passing responsibility between various managers in an incoherent and contradictory manner. All witnesses testified that a meeting took place on June 2, involving, at the very least, Deb Schultz, Joan Hoeschen, Jim DiBiagio, and Dallas Gravelle. (Tr. 342, 1823, 1612.) However, at this meeting, no final decision was

made regarding whether any terminations would take place. *Id.* After this meeting, Deb Schultz took FMLA leave, and returned to work on June 16. When she returned to work, the decision to terminate employees *had already been made.* (Tr. 1826.) However, the other witnesses who testified and who were purportedly involved in the termination discussions, Jim DiBiagio and Joan Hoeschen, did not provide any coherent testimony about meetings between June 2 and June 16. (See Tr. 1611–18; Tr. 346–74.)[19] As such, the record is unclear *when* the decision was made to terminate employees, *who* was involved in that decision, and *what considerations were relied on* between June 2 and June 16 to determine whether a termination was necessary. These *crucial* gaps in testimony, particularly on the eve of the election, demonstrate Respondent's failure to meet its *Wright Line* burden.

Another unexplained contradiction in Respondent's testimony is the participation—or lack thereof—of Lori Gill in these termination discussions. According to the documentary evidence, and the testimony of Deb Schultz and Joan Hoeschen, Lori Gill was involved in the initial discussions regarding possible terminations in June. (RX 69 and GCX 97 (listing Lori Gill as participant in June 2 and June 5 meetings); Tr. 342, 397.) Gill, however, was emphatic in stating that she did *not* participate in any discussions regarding the terminations, nor was she ever asked for any data to support the terminations. (Tr. 1412–14.) And, according to DiBiagio (who heard all of the testimony regarding these meetings as

[19] Additionally, although all witnesses testified that Dallas Gravelle was involved in at least some conversations surrounding these terminations, he was not called as a witness by Respondent.

Respondent's designated representative), Gill did not participate in any formal discussions regarding the layoffs, but rather was a source of information that was discussed at these meetings. (Tr. 1611.) These inconsistencies regarding even the participation of certain individuals in *crucial* meetings further cloud the validity of Respondent's terminations.

Respondent's account of the paint matrix, and the various permutations of that document, are also nonsensical. For example, GCX 15(b)—the initial version of the matrix—was emailed to Respondent's Human Resources Manager Deb Schultz on June 17th by Joan Hoeschen at 12:05 pm. After sending this email, according to Hoeschen, she had a brief discussion with Schultz about weighting the document, and then was no longer involved in the termination process. (Tr. 365–66.)[20] Schultz, by contrast, testified that when she came back from her FMLA leave on June 16, she immediately began working on the paint matrix in 15(b) with Jim DiBiagio, and sometime on the 16th or 17th created GCX 15(c), a derivative form of 15(b) with seniority and weighting added. (Tr. 398–99, 404.)

As if this testimony was not confusing enough, there is also GCX 15(d), a version of 15(b) with handwritten notes on it. According to Schultz and DiBiagio, this was a document that DiBiagio and Hoeschen worked on. (Tr. 416–17, 1615–18.) However, when General Counsel tried to enter this document through Hoeschen, she claimed never to have seen it before and was unable to authenticate

[20] Hoeschen, however, later contradicted herself by admitting that Schultz in fact did run the names of some of the painters by her before terminating these employees. (Tr. 371, 374.)

the document. (Tr. 362–63.) Additionally, according to DiBiagio, GCX 15(d) is actually a "clean" version of another version of the matrix with various (unspecified) individuals' handwriting on it. (Tr. 1616.) When pressed on the location of this other matrix, DiBiagio claimed that it was thrown away. (Tr. 1668–69). DiBiagio also was unable to identify who was present at the meeting where GCX 15(d) was created or whose handwriting was on this earlier document. (Tr. 1667–68.)

Similar inconsistencies plague GCX 15(c), a later version of the matrix in which seniority and weighting were added. According to Schultz and DiBiagio, they created this document based on earlier versions of the matrix, such as 15(b) and 15(d). (Tr. 406, 1671, 1829.) Yet neither DiBiagio nor Schultz could provide a coherent explanation for why these matrices were manipulated, who manipulated them, or when they were manipulated. Schultz claimed that the decision to add seniority to the matrix was made by DiBiagio, and that the decision to remove seniority was a joint decision made by both DiBiagio and Schultz later that same day. (Tr. 409, 414–15, 1898–99.) Schultz, when pressed, was ultimately unable to provide a coherent explanation for why it was removed. (Tr. 414–15.) DiBiagio claimed that he can't remember who added in the seniority, but that it wasn't him. (Tr. 1670–71.) Additionally, DiBiagio was unable to explain even when this document was created. (Tr. 1670.) Yet, somehow, seniority was removed from the final version of the matrix that led to the terminations of the six painters. (GCX 15(a).)

This inability to account for crucial decisions, including the decision to terminate employees at all, and the steps that led to various versions of the matrices, cast doubt on the validity of the decisionmaking process relied on by Respondent. An unaccountable series of steps, if left to stand, is an unimpeachable defense. In order to satisfy its burden under *Wright Line*, Respondent must establish *the* reason for the termination decisions—yet it cannot even establish the process it followed to reach these decisions. Particularly in light of the overwhelming amount of animus occurring contemporaneously with the termination decision, this failure contributes to Respondent's inability to sustain its burden under *Wright Line*.

Further discrediting this matrix is Hoeschen's lack of experience in paint. She openly admitted that she created and filled in the numbers for the paint matrix without assistance from any other leads or managers. (Tr. 349.) Yet, a review of her prior experience and duties reveal that she was not in a position to competently rate these employees. Hoeschen, a manager whose experience centers on operations, openly admitted that she did not have experience painting. (Tr. 310.) Despite this lack of prior experience, Respondent did not attempt to develop any competency or expertise Hoeschen's ability to evaluate paint work.

Not only was Hoeschen unqualified to rate the quality of the painter's work, she also did not spend sufficient time in the paint department to rate employees' work. According to Paint Lead Kerry Esler, although Hoeschen initially spent significant time in the paint department after assuming the manager position for

paint in July 2013, her presence in the department decreased greatly after the winter of 2013. (Tr. 660–63.) Moreover, according to Lee Kostal, a long-time painter, Hoeschen never spent any time at all in the paint booths observing the work of painters. (Tr. 818–20.) Indeed, Hoeschen was unable to even define how long her senior painter, Mitch Johnson, had been in that position. (*Compare* Tr. 357–58 (Hoeschen claiming that Mitch Johnson had been senior painter since before she started managing paint in July 2013) *with* GCX 42 and Tr. 407.)

Given these considerations, it is unsurprising that Hoeschen was unable to define, in a coherent fashion, the ratings that she applied to the paint matrix. According to Hoeschen, she determined the ratings based on something called "takt," which is allegedly the standard time that should be taken to complete work on a given part. (Tr. 328–29.) Hoeschen relied solely on her extremely limited knowledge of painting, and not any industrial guidelines, to define what "takt" should be in that department. (Tr. 328.) An employee, according to Hoeschen, should be given a "3" if they can consistently meet "takt" in paint. *Id.* Yet, she never defined what "takt" numbers were for a given part, or how she kept track of "takt" in the paint department. Paint Lead Kerry Esler, who was in charge of assigning employees and ensuring the operation of the paint department (Tr. 655–58), testified that there was no "takt" time that he was aware of for employees in the paint department. (Tr. 716–17.)

Even more problematic, a ranking of "4" in a given skill was reserved for employees who were rated at "train the trainer." According to Hoeschen's initial

testimony, the "train the trainer" program had not been developed or formalized for any department. (Tr. 340–41, 390–91, 1726.) Yet, despite the fact that "train the trainer" had not been developed for any department, including paint, senior painter Mitch Johnson—who just coincidentally happened to serve as Respondent's observer at the election—received 4's *in all skills*. (Tr. 391–92.)[21]

Hoeschen, in contrast to her practice in the welding and fabrication department, also did not rely on the input of Paint Lead Kerry Esler in creating the paint matrix. (Tr. 349.) This failure to rely on Esler is curious, given that Esler had more experience than her in running the paint department and controlled assignments in the department. (*See* Tr. 673–74 (noting that Esler overrode Hoeschen's recommendation to rotate painters in the department).) It is also is perhaps not surprising, given Esler's refusal to participate in her unlawful anti-union activities.

Even crediting Hoeschen's limited review of the paint work, this review was flawed. In making her ratings, Hoeschen claimed that she based her review in paint on the "quality of parts that come out of the area." (Tr. 1726–27.) However, according to Esler, many times the errors that occurred in painting would be caught before the part even left the department. (Tr. 671.) Additionally, there was no

[21] Hoeschen attempted to explain away this contradiction by pointing out that, as senior painter, it was his job to train the other painters. (Tr. 392.) However, this explanation does not hold water. Hoeschen explained earlier in her testimony that receiving a 4 *required* passing the "train the trainer" program, and did not simply indicate the ability to train other employees in a given skill. (Tr. 340.) Obviously, no satisfactory explanation was given for the 4's that were given to Johnson, and Hoeschen's inability to do so discredits her matrix and her testimony at large.

formal system of reporting errors to Hoeschen—rather, painters were expected to "just fix it." (Tr. 672.)

Hoeschen also chose to ignore the metrics from the quality department. According to Hoeschen, the quality department keeps records of corrections that are made in touch-up. (Tr. 369–70.) Despite the presence of these objective numbers, however, Hoeschen chose to rely solely on her own subjective recollection of eleven months worth of painting work.[22]

The flawed nature of the paint matrix is driven home by the testimony of the employees who worked every day in the paint department. Employee testimony regarding the large booth most starkly illustrate the flaws in the matrix. Lee Kostal and Rick Andrews were primarily responsible for painting large parts for Respondent, and spent the vast majority of their time in the large booth. (Tr. 774, 821.) According to Esler, he had Kostel and Andrews in the large booth because they did the best work in that area; he had tried rotating the large paint booth positions in the past, and found that it had led to lower quality work and more touch-up. (Tr. 673–74.) Yet, despite the amount of time that these employees spent in the large paint booth, and the quality of their work, they received "3" ratings in

[22] Curiously, instead of relying on the input of the present paint lead, or the objective metrics from the quality department, Respondent chose to involve the former paint manager, Dallas Gravelle, in the latter stages of the termination decisions. (Tr. 402–03.) Gravelle's involvement in these decisions is particularly suspect, as he was not called as a witness to describe his input into these numbers. *Flexsteel Industries*, 316 NLRB 745, 757–58 (1995), *enforced*, 83 F.3d 419 (5th Cir. 1996).

their painting in drying skills in that area, and "1" ratings in the prep and wash ratings for the large booth. (GCX 15(b).)

Other employees, who had limited work in the large booth, received higher ratings. Senior Painter Johnson spent only one or two days a month in the large booth area. (Tr. 776, 882.) Yet, it was Johnson who received "4"s across the board in the large paint booth, based on Hoeschen's review. (GCX 15(b).) Eric Yeschick, who received "3"s for all areas in the large booth, worked only one to three times in the large booth in all of 2014. (Tr. 776, 822–23; GCX 15(b).) Lee Gustafson, who both Kostal and Andrews stated never worked in the large booth, received a "4" in paint prep for that area. (Tr. 777, 823.)

The flawed nature of these ratings are also illustrated by the testimony of Kerry Esler. Esler, who had worked as a paint lead for several years longer than Hoeschen, contradicted Hoeschen's matrix in numerous respects:

- Lee Gustafson was overrated in painting skills, as he had only painted one day and spent all of his time loading parts. (Tr. 664–65.)
- Danny Curtis rarely painted, and when he did it was in dark colors and "B" surfaces that were not readily visible. (Tr. 665–68.)
- If there were a difficult painting assignment involving light colors, Esler would assign Kostal and Andrews to do it above Steve Kruk. (Tr. 668–69.)
- Dale Persson only painted in small booth for a limited period of time. (Tr. 670.)
- Erick Yeschick and Mitch Johnson painted quickly, but committed many errors. (Tr. 670.)
- Esler's duties as paint lead were completely excluded from the matrix, despite the fact that he had been hired with the understanding that he would not be painting as a lead in the department. (Tr. 655–59.)

Indeed, Esler—who played no part in creating the matrix—spent far more time dealing with the actual numbers in the matrix than any of Respondent's witnesses. And his testimony clearly demonstrated the flawed nature of Respondent's matrix.

Importantly, Respondent did not rebut this testimony with other employees who worked in the paint department, nor did Respondent even try to explain these rankings further when Hoeschen was recalled to testify in the second week. In light of this unrebutted testimony, these rankings should be wholly discredited.

Even assuming that one credits Hoeschen's flawed numbers from GCX 15(b), these were not the actual numbers relied on by Respondent in terminating the painters. Rather, these numbers were weighted, and seniority was added and then taken out, by Human Resources manager Deb Schultz and General Manager Jim DiBiagio. Neither of these decisions are defensible, given the lack of experience that both senior managers had in the paint operations at Respondent.

Indeed, Schultz's testimony on painting work revealed a complete lack of knowledge regarding actual operations and an inability to define even the most rudimentary aspects of this work:

- Inability to describe how a viscosity check is completed and which employees in the department are tasked with completing it. (Tr. 1891)
- Inability to define what the most difficult work in the paint department is. (Tr. 1892.)
- Unable to define what an "A" surface is in the paint department. Tr. 1892

- Unable to describe how sanding works (despite describing it earlier as "easy" work). (*Compare* Tr. 1892 *with* Tr. 1839.)
- Unable to determine whether overtime was worked in touch-up department after layoffs. (Tr. 1895.)
- Unable to determine whether powder-coated paint requires touch-up work. (*Compare* Tr. 1839 *with* Tr. 1896.)

Despite this damaging testimony from Schultz, Respondent did not even attempt to establish any paint expertise from General Manager DiBiagio, nor could it likely do so given his background. (Tr. 50–57.) Their collective inexperience in the paint department belies their inability to effectively rate employees' work in that area.

Additionally, the decision to add, and subsequently remove, seniority casts further doubt on the validity of their modifications to the underlying rankings. When asked to explain why seniority was implemented and then subsequently removed, Schultz explained:

> A We discussed that all the other ratings were given a score between 1 and 4; and so by using a seniority in that ranking order and using those numbers in that way would assign a higher weight to seniority. So, for example, a person -- if you're scoring someone as a "4" meaning they are fully capable and able to cross-train someone on a job, -- a score of "11" would give almost three times the factor as their capability of doing the work; and that's not what we intended as we were going through the matrix. (Tr. 1843; *see also* Tr. 414–15.)

This testimony, however, is incorrect. In fact, Respondent weighted seniority at .5 on its final matrix, which meant that, at most, seniority could be worth 1 point more than any other factor—not three times as much as testified to by Schultz. (*See* GCX 15(c).) Schultz and DiBiagio also did not follow Terex's corporate handbook, which

states that seniority should be a factor in considering termination decisions. (Tr. 1672–73, *compare with* Tr. 409.) Moreover, the timing of this removal—that it was placed in the matrix and removed in the same day—suggests that the matrices were being constructed in an arbitrary and rushed manner in order to avoid dealing with the Union. (*Compare* GCX 15(c) *with* Tr. 1898.)

In short, the creation and manipulation of the paint matrix was rushed, flawed, and did not involve those individuals in the best position to determine the quality of work being done in the paint department. Compounding these issues, Respondent's testimony regarding the creation and manipulation of these matrices was deeply flawed and incomplete. The use of such an arbitrary system for determining the layoff of over half of the paint department at Respondent's workplace suggests not only that the selection criteria was wrong, but that Respondent was motivated by something other than legitimate production concerns in making the decision to terminate employees in the first place. This concern, of course, was the pending Union vote by employees.

b. The welding and fabrication matrix

As with the paint matrix, the matrix relied upon by Respondent in deciding who to layoff in the welding department was also deeply flawed. First, the welding leads who created the base document relied upon by Respondent in the layoff decision created the document for a different purpose, and marked the document differently than understood by Respondent's managers. Second, the welding matrix was based on outdated skills, did not encompass much of the work done in the

welding department, and ignored other valuable performance metrics. Third, as with paint, Hoeschen did not have the appropriate welding experience to rate the skill of the welders. Fourth, to the extent that Respondent was relying on the matrix to transfer welders and fabricators to other departments, their skills in the welding department were irrelevant.

In contrast to the paint matrix, discussed above, Respondent chose to involve the welding and fabrication leads, Jeff McCartney and John Maddoll, in aiding with the creation of the matrix. According to Respondent, leads marked which areas employees were "cross-trained" in (RX 15(a) and (b)), and then Hoeschen inputted their actual numerical ratings. The input of the leads, however, far from bolstering the legitimacy of the weld/fab matrix, demonstrates the flawed nature of this matrix.

As an initial matter, when Respondent spoke with the leads regarding the creation of the welding and fabrication matrix, they were instructed that the matrix would be used for cross-training. Lead Jeff McCartney identified the document as a "cross-training matrix," and that the purpose of the document when he filled in the marks was to "identify who's cross-trained into what areas." (Tr. 1237–38.) At no point were the leads informed that the documents would be used for laying off employees in the welding and fabrication areas—in fact, it was not until trial preparation with Respondent's counsel that McCartney discovered that his document had been relied on for layoffs. (Tr. 1248, 1250.)

Perhaps even more damning, there is a serious contradiction between what the leads understood the marks in the chart to mean and what Hoeschen understood these marks to mean. According to Hoeschen, the marks indicate "proficiency" in an area. (Tr. 319.)[23] Jeff McCartney, the only lead who testified regarding what the marks meant, established a far different meaning for these marks:

> Q: Now, you mentioned that when you put a dot in the box, that as you were doing that, that meant that they would be capable of training in that skill, is that right?
>
> A: They would be capable of being able to train another employee, yes.
>
> Q: Of actually training someone?
>
> A: That's how -- yup, that's how comfortable they'd be to work in that area.
>
> Q: So as –- when there's a dot in the box, and you placed it there, that's a high level of skill?
>
> A Yes. (Tr. 1240).

McCartney also clarified that these marks did not in any way reflect his feelings regarding who should be terminated based on welding skill. (Tr. 1248.) Moreover, Respondent did not call the second weld lead, John Madoll, which should lead to a

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[23] It should be noted that Hoeschen was simply unable to define "proficiency" in any way other than a circular matter:

> Q: And by -- as the manager of paint and weld and fab, when you use the term "proficiency" and specifically when you used it with Mr. Madoll and Mr. McCartney, what did that mean?
>
> A: They could move into another cell and they could work and be proficient in that cell. (Tr. 319).

conclusion that his testimony would have been *at least* as damaging to Respondent's case as McCartney's.

Given the confused understanding of document underlying the welding and fabrication terminations, Respondent's argument that this document was legitimately relied on in making the termination decisions should be discounted.

Additionally, as with the paint department, Hoeschen did not have sufficient experience to accurately judge welding. When questioned regarding her welding experience, Hoeschen testified as follows:

> Q: Okay. And do you have any background in welding?
> A: I'm married to a welder. I've been around it for 30 years. (Tr. 1791).

She did not provide any additional testimony about her experience or any practical information regarding her ability to assess welding skill. Nor is it likely she could, given her background in operations and her inexperience with welding.

Moreover, even discounting her lack of technical proficiency, Hoeschen's testimony reflected a lack of understanding regarding welding operations. She was, for example, unable to remember initially where welder Mike Kossow was working at the time of the terminations. (Tr. 324–25.) She also was unable to specifically define the "takt" times that she was allegedly relying on in making her termination decisions. (Tr. 328–29.) Welder Mike Kossow also testified that Hoeschen was rarely on the floor, and that the only feedback he ever received on his welding was from his lead—not from Hoeschen. (Tr. 961–62.)

Even discounting the contradictory understanding of these marks, and Hoeschen's complete lack of experience in welding, Hoeschen's process for translating these marks to the matrix was fundamentally ridiculous. Hoeschen had the leads fill in the areas that employees were either "proficient" in (or capable of "training other employees" and were "highly skilled" in) because she was unable to identify these areas on her own. However, after having the leads do this, she then was somehow magically able to obtain the knowledge translate these marks into a precise numerical rating, reflecting the specific level of skill in an area of welding that she could not even identify an employee as being proficient in the first place. This completely ridiculous process wholly undermines the legitimacy of the welding and fabrication matrix.

In addition to these deficiencies, the underlying welding matrix does not accurately reflect the work being done in the welding department at the time of the terminations. Hoeschen testified that, when she initially presented the cross-training matrix to the welding leads, she relied on a copy that she had found on the company's computer database. (Tr. 313.) According to Hoeschen, this matrix had been created by the previous supervisor, Don Hansen, before he left in July 2013. (Tr. 314.) Despite the document having not been updated since, at the latest, July 2013, Hoeschen was unable to recall what, if any, changes she made to skills documented in the matrix. (Tr. 316–17.)

The deficiencies in the matrix were identified in the testimony of the welders at hearing. Welder Tony Knight testified that he oftentimes welded tensioners,

pivot arms, and track tools—none of which were skills indicated on the matrix. (Tr. 909.) In addition, the service parts that Tony Knight worked on—of which there were at least 30–40—were subsumed under the heading "30 quick attach/service parts." (Tr. 909–10; Tr. 337 (Hoeschen estimating there were about 100 different service parts).) Welder Mike Kossow also identified many parts that he worked on, including "dog bones," that were not on the matrix. (Tr. 960.)[24]

Hoeschen's refusal to look beyond the flawed matrix is equally problematic. She admitted that, when considering which welders would be terminated, she did not consider whether they had any welding certifications. (Tr. 375–77.) Her gross

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[24] The unreliability of the matrix is also exemplified by this exchange with Hoeschen regarding the "Saw 1" and "Saw 2" skills:

Q: So he cuts -- now Saw , he cuts steel tubing in the fab department.

A That's correct.

Q That's what you do with Saw 1?

A You do it with both Saw 1 and Saw 2.

Q What's the difference when you would use Saw 1 or Saw 2?

A If Saw 1 was overloaded, then you would use Saw 2.

Q So it's exactly the same saw?

A That's correct.

Q Okay. And they perform the same functions?

A That's correct. (Tr. 333–34)

Despite the fact that the two saws do exactly the same thing, they were double-weighted on the matrix, while at the same time Respondent subsumed 40 to 100 service parts into half of a heading.

negligence in refusing to look at certifications and previous performance reviews demonstrate that the terminations were motivated by considerations other than legitimate business needs.

Indeed, the claim that the terminations here were driven by legitimate business need is shattered by looking at where employees were working when they were terminated. Respondent, in making the final decision to terminate employees, chose to transfer some of its welding and fabricating employees into assembly departments. (GCX 14). These transfers, however, were based on rankings of employees' skills in *welding and fabrication*, not based on their skills in assembly. (Tr. 130–32). Even more incredibly, in making the decisions regarding who to transfer, Respondent chose to simply ignore employees' experience in other departments. This meant that employees—like Mike Kossow—who were at that time *working in assembly*, were let go in favor of other welders who were then transferred to assembly without any prior experience. (Tr. 423, 425.) Other welders with literally *years* of experience working in other departments were also let go. (Tr. 442–43.) To the extent that Respondent was trying to create a "lean" plant with "cross-trained" employees, it is simply nonsensical that Respondent would ignore experience in other departments when deciding to terminate employees.

c. The selection of certain painters and welders demonstrates the ridiculousness of the matrices and was independently unlawful

The pretextual nature of Respondent's matrix is demonstrated by the *selection* of certain active union organizers in these two departments for termination, as opposed to other employees who continued to remain employed. Despite nominally selecting employees on the basis of their skills, and the breadth of their experience, Respondent's ridiculous selection method was used as a pretext to target some of the most active union organizers in the painting and welding/fabrication departments. These selections were themselves independent violations of Section 8(a)(3), and cast further doubt on the validity of the matrix.

Painter Lee Kostal:

Lee Kostal, one of the painters terminated in the second round of the layoffs, was truly the engine of the union organizing campaign in the paint department. He solicited authorization cards from painters, attended union meetings starting in February, served as the Union's election observer, and participated as an employee representative on the union's negotiating committee until his termination on August 14. (Tr. 824.) Like several other painters, he also wore a union t-shirt to work. (Tr. 826.) Perhaps most importantly, he served as the Union's sole witness for the paint department at the R-case hearing in Minneapolis in May. Although the parties stipulated to the appropriateness of the paint unit prior to this hearing (thus obviating the need for Kostal's testimony), he was seen at the hearing with the union representatives by Deb Schultz and Jim DiBiagio. (Tr. 825–26.)

Respondent's evidence of animus has already been discussed in detail, and does not need to be recounted in detail. Given Respondent's animus, and Kostal's

prominent and unique role in the organizing campaign with the painters, it is unsurprising that he would be targeted.

The general merits of the paint matrix, or more precisely, the lack therefore, have been extensively addressed above and need not be discussed again. With respect to Kostal's specific rankings, however, several points bear mentioning. First, as numerous witnesses testified, Kostal was one of the two most skilled painters at Respondent's facility. Kostal and another painter, Rick Andrews, were primarily tasked with painting the most difficult parts, in the most difficult colors, and on the most visible surfaces in the large booth. (Tr. 669.) Indeed, Kostal and Andrews were the only painters skilled enough to regularly do large booth work—yet Kostal was rated only an 8 in that area, lower than three other painters, and tied with two more. Second, Kostal's touch-up rankings also are flawed. (Tr. 699; GCX 15(a).) Prior to work in the large booth, Kostal ran the touch-up department, and in fact trained touch-up painter Dennis Feltus, who was rated a "4" in that area. Yet, despite Kostal's previous experience *running* that section of the paint deparment and training an employee rated at a "4," he was only rated a "2" in touch up. (Tr. 815; GCX 15(a).) Third, during Kostal's time in the department, he also testified that he had extensive experience doing *all* of the tasks in the small booth—yet he was rated 9th out of the 12 painters (including behind the lead Kerry Esler, who by his own admission did not know how to paint). (Tr. 655–57, 816; GCX 15(a).) Based on these considerations, it is clear that Respondent did not make a good-faith effort to rank Kostal's skill as a painter *vis a vis* his co-workers, and that

Respondent in fact designed its matrix in such a way as to target him as a lead union supporter.

Paint Lead Kerry Esler:

Respondent's selection of Paint Lead Kerry Esler for termination also was unlawful. Esler, while not as visible in his union activity as Kostal, also supported the union in the paint department. Esler wore a union shirt at work, attended several union meetings, and signed an authorization card on behalf of the painters. (Tr. 675–76.)

Perhaps more importantly, he was directly targeted by Paint and Weld/Fab manager Joan Hoeschen in her anti-union efforts, and rebuffed these efforts. Three times before the election, and one time after the election, Hoeschen targeted Esler with questions and threats about the Union. (*See* pp. 6, 7, 14, *supra*.) These efforts were perhaps unsurprising, given his status as the lead of the department. As a statutory employee, however, his position as a lead did not privilege Hoeschen's unlawful conduct and the animus she displayed towards him due to his union activity.

Respondent again justified its termination of Esler on the same flawed matrix that it used to justify the termination of Kostal. This matrix, however, was equally as flawed as applied to Esler. Esler's duties as paint lead did not include any of the painting skills listed in the matrix. (Tr. 657.) Rather, it was his job to ensure that the department was well-supplied and that it met Respondent's production goals. (Tr. 655.) Yet, despite his obvious and known lack of paint skills,

Esler was rated on the same matrix as all of the other employees in the paint department. Perhaps even more importantly, Respondent's claimed justification for the matrix was to ensure that employees were cross-trained, and could work in various areas of the plant. By this criteria, however, Esler was one of the most cross-trained employees in the entire plant. During his 17 year career with Respondent, Esler worked in the following positions:

- 1.5 years in fabrication
- 3 years as nightshift lead for welding, fabrication, subassemblies, and paint
- 4 years as quality control employee
- 1 year as night shift lead in paint and subassembly
- 2 years as day shift subassembly lead
- 1.5 years as store lead (part of warehouse)
- 2 years as paint lead
- 6 months as night shift lead in fabrication and paint
- 2 years as paint lead

In his career, Esler worked in literally *every single one of Respondent's production departments*. (Tr. 646–53.) Yet, despite Respondent's desire to retain "cross-trained" employees, he was let go. This justification is simply nonsense, and shows that it was his union activity, and more specifically his refusal to join in Hoeschen's anti-union activities, that led to his termination.

Welder Tony Knight

Tony Knight was one of two prime movers in the welding department (along with Mike Kossow, discussed below). He was one of six employees who attended the initial union meeting. In addition, he was the employee who provided the union with the suggestion to organize department by department (Tr. 928–29.)

Respondent's animus, as discussed above, was not just limited to the paint department. Rather, Respondent also demonstrated its animus towards potential organizing by employees in the welding and fabrication department, as those employees were required to attend one of the George Ellis meetings in which he uttered the unlawful threats.

The welding and fabrication matrix, as applied to Knight's skill as a welder, was patently absurd. First, the matrix severely underrated Knight's versatility and "cross-training" as a welder. Knight's primary role in the weld department was to weld service parts for Caterpillar. These service parts were listed under one category on the matrix, yet comprised at least 40 different parts—almost as many parts as were listed on the rest of the matrix combined! (Tr. 910; *compare with* GCX 14.) In addition, several other parts that Knight welded were also missing from the matrix. (Tr. 909.) Second, although Respondent justified its layoffs in welding primarily on a downturn in skid steer loaders, Knight's work primarily consisted of work on tracked machines (namely, tensioners, track tools, and Caterpillar service parts). (Tr. 899.) These areas were not struggling. Catepillar undercarriage orders were well above projected numbers in 2014. *See discussion infra* p. 76. The Caterpillar service parts that Knight primarily worked on were doing even better, as indicated by this chart derived from Respondent's flash reports:

Month	Cat Spare Parts

	(compared to budget
December '13	$1,755,000
January	-$328,000
February	-$313,000
March	-$82,000
April	$174,000
May	$325,000
June	-$314,000
Total	$1,217,000

(GCX 84–90; Tr. 337 (noting that service parts are mainly for Caterpillar).) It is no surprise, given these numbers, that Knight characterized his workload as "really busy" in 2014. (Tr. 900.) Third, Knight was by all accounts one of the most skilled welders at Respondent's facility. His performance reviews from 2009 to 2011 (his most recent reviews) universally praised Knight's quality and versatility as a welder. (GCX 52.) In fact, when Respondent expanded its business to include skid steer loaders, Knight was charged with welding the prototypes for the new machine. (Tr. 906.) Given these considerations, it appears that Knight's union activity, and not his supposed lack of welding skills, that led to his selection for termination.

Welder Mike Kossow

The other prime union proponent in the welding department, Mike Kossow, was also selected for termination under suspect circumstances. Kossow was involved in soliciting a large number of authorization cards in the assembly department—the department he was working in during the organizing campaign.

(Tr. 933–50.) In addition, Kossow attended all but two of the union meetings during the campaign and talked with welders about the union on lunch break prior to moving to assembly. (Tr. 966–67.)

As with the other terminations discussed here, Respondent relies on the cross-training matrix to justify its selection of Kossow. This matrix, to the extent that it is not wholly discredited, is missing much of the work that Kossow did in the welding department. (Tr. 959–61.) The majority of the work that Kossow did in the welding department involved welding rails for the compact track loaders—and thus did not involve the alleged downturn in skid steer loaders that led to terminations in the welding and fabrication department. (Tr. 952–53.) In addition, like Esler above, Kossow had experience throughout Respondent's plant. He began in assembly for two years; he then moved to paint for three years; moved to welding until January 2014; and then spent his last six months in assembly on disability until his termination. (Tr. 951–53; *see also* Tr. 816 (Kossow trained Kostal in paint).) Accordingly, to the extent that Respondent sought to retain employees who were highly "cross-trained" in the work that it would be doing going forward, Kossow should have been retained. The fact that he wasn't demonstrates that it was his union activity, and not his lack of skill, that caused his termination.

ii. The alleged business downturn does not explain Respondent's terminations

At hearing, Respondent went to great pains to establish that the terminations at issue in this case were motivated by an alleged business downturn that, coincidentally, just happened to overlap with the onset of employees' union

activity at the facility. While the General Counsel does not dispute the premise that a business may respond to business conditions with cost reductions, including layoffs if necessary, this general principle cannot provide a shield to personnel actions that are motivated by unlawful animus. Here, the alleged downturn, to the extent it exists, does not support the decision to terminate employees for at least six reasons:

- First, a comparison of Respondent's labor absorption rates—which by Respondent's own admission, are the best metric for tracking labor costs—indicate that Respondent experienced worse labor absorption rates in 2013, and in departments that weren't organizing in 2014, as compared to the labor absorption rates in those departments that were organizing at the time of the terminations.
- Second, the figures that Respondent will likely rely on to support the terminations do not take into account increased orders with Caterpillar, ignore the fact that, at the beginning of the year, Respondent was operating well above projected orders, and are countered by the unrebutted accounts of employees' workload.
- Third, to the extent that a downturn did occur, Respondent's quick trigger on terminating employees is inconsistent with its practices in 2012, 2013 and the beginning of 2014.
- Fourth, assuming that Respondent's projected downturn is reliable, Respondent was aware of this downturn beginning in the fall of 2013,

continued to hire more employees despite the projected downturn, and began to discuss terminations only after the election petitions were filed.

- Fifth, Respondent's inability to meet production deadlines, inconsistent staffing ratios, overtime, and new hiring after the terminations indicate that the terminations were in fact not necessitated by an alleged business downturn.
- Finally, the extremely suspicious timing on the eve of the first union election cannot be satisfactorily explained by any supposed business justification.

In light of these considerations, the clearly pretextual method used to select employees for termination, and its demonstrated animus towards its employees' protected activities, Respondent has not satisfied its burden under *Wright Line*.

a. Respondent's disparate treatment is proven by its labor absorption rates

Perhaps most telling in determining the true motivations for Respondent's terminations is a comparison of the labor absorption numbers in 2013 and 2014, and between those departments that were organizing versus those departments that were not organizing in 2014. These numbers show that Respondent experienced far worse labor absorption numbers at times and in departments that were not organizing, yet did not terminate these employees.

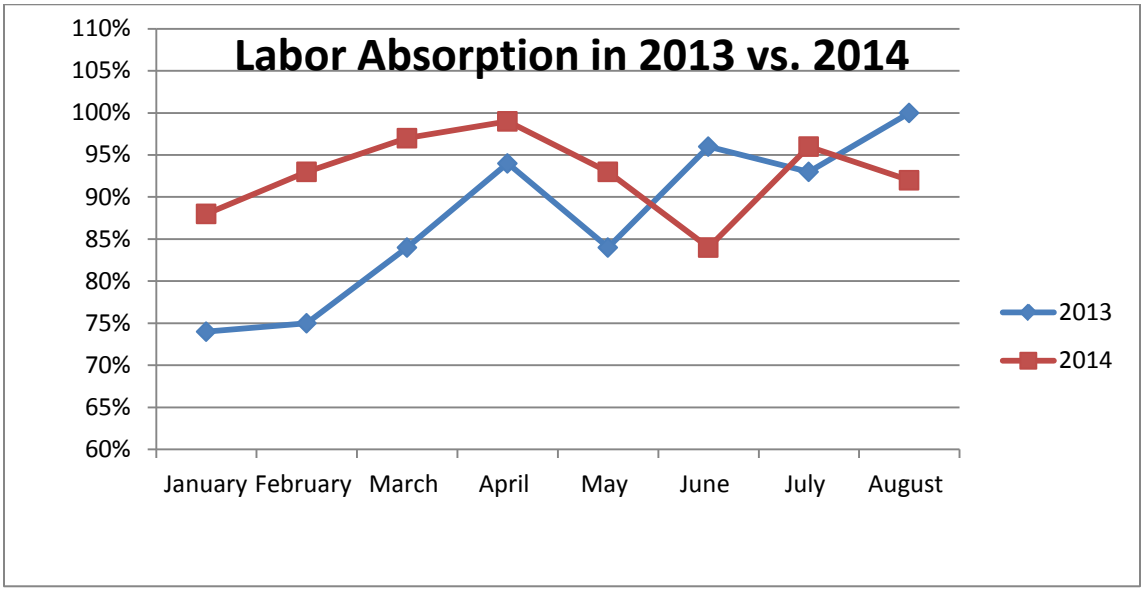
The importance of these labor absorption figures cannot be overstated. Unlike backlog, orders, or sales figures, the labor absorption figure *directly*

indicates whether Respondent is properly staffed for the number of machines it is producing. As explained by General Manager DiBiagio at hearing, labor absorption is the key measure for determining staffing levels for Respondent: "[L]abor absorption in this facility, [sic] lack of any other true metric, we use that as an indicator of productivity. So if our labor absorption is above one hundred percent that means we're productive, favorably productive, exceeding our standard costs. If our labor absorption is less than one hundred percent, we're not in a favorable position."[25] (Tr. 95.)

[25] Respondent calculates labor absorption by multiplying the standard labor cost for each machine by the number of machines produced, and then dividing that composite number by the actual wages paid to employees. This generates the labor absorption percentage. (*See* Tr. 95–96.)

Comparing the month by month labor absorption numbers from 2013—when no production employees were laid off—with the numbers from 2014—when production employees who were organizing were laid off—reveals telling trends:

	2013	2014
January Labor Absorption	74%	88%
February Labor Absorption	75%	93%
March Labor Absorption	84%	97%
April Labor Absorption	94%	99%
May Labor Absorption	84%	93%
June Labor Absorption	96%	84%
July Labor Absorption	93%	96%
August Labor Absorption	100%	92%

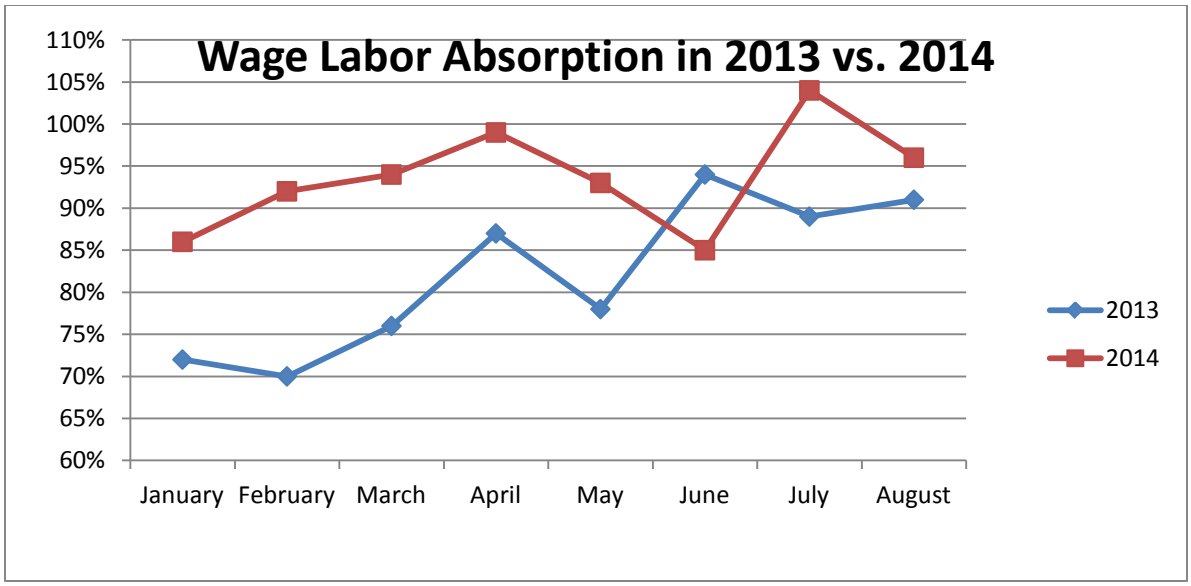


Throughout much of 2013, Respondent accepted labor absorption rates that were much lower than those experienced at any point in 2014 without terminating employees. Indeed, in January and February, labor absorption was about 10% lower than in June 2014—when Respondent implemented the first round of terminations in response to the Union organizing campaign. At the time of the second round of terminations in August, which were also supposedly motivated by a lack of work, the labor absorption rate was 92%—well above 4 of the first 5 months of 2013 (again, when there were no layoffs).

Comparing 2013 to 2014 solely by *wage* labor absorption (which are generally paid to the manufacturing employees (Tr. 1577)), as opposed to salaries and wages combined, reveals an even starker comparison:

	Wages 2013	Standard Labor Wage 2013	Wage Absorption 2013	Wages 2014	Standard Labor Wage 2014	Wage Absorption 2014
January	473[26]	340	72%	448	385	86%
February	445	312	70%	397	365	92%
March	535	408	76%	444	419	94%
April	525	457	87%	429	423	99%
May	545	425	78%	408	380	93%
June	430	403	94%	386	326	85%
July	443	395	89%	318	332	104%
August	408	373	91%	342	329	96%

[26] All numbers in thousands of dollars.

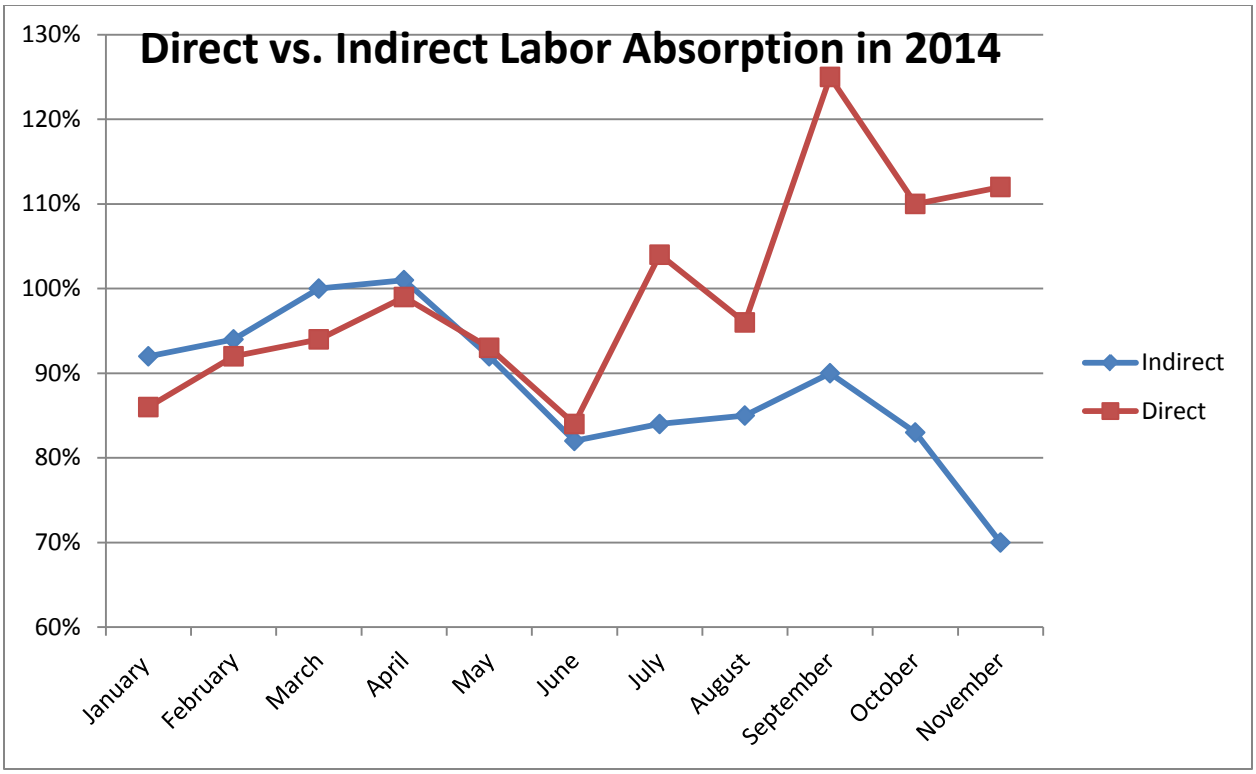


Under these metrics, Respondent's wage labor absorption in 2014 never even came with 15 percent of the labor absorption rates in February 2013. In fact, labor absorption in four of the first five months of 2013 was lower than it was in June 2014—when the first round of terminations occurred. And, at the time the second terminations occurred in August 2014, Respondent's wage labor absorption rate was actually higher than it was at any point during the first eight months of 2013. By a month-to-month comparison, Respondent's labor absorption rates were lower in every month in 2013 as compared to 2014—except one. Accordingly, these numbers suggest that Respondent's terminations of the production employees were not motivated by concerns about overstaffing or labor efficiency. Rather, these figures demonstrate that Respondent terminated the paint and weld/fabrication employees because of their Union activity.

Comparing indirect versus direct employees[27] within 2014 confirms the unlawful motivation for these terminations:

	Indirect Labor Absorption	Direct Labor Absorption
January	92%	86%
February	94%	92%
March	100%	94%
April	101%	99%
May	92%	93%
June	82%	84%
July	84%	104%
August	85%	96%
September	90%	125%
October	83%	110%
November	70%	112%

[27] "Indirect" employees are those employees who are not involved directly in the production of the products that Terex builds. (*See* Tr. 1871.)



As seen in the graph and table above, the labor absorption numbers for indirect and direct employees generally track one another, *until the terminations in June and August* (which, coincidentally, only affected employees organizing for the union). At that point, labor absorption for direct production employees began to *exceed* 100 percent,[28] while absorption numbers for indirect employees, who were not organizing, continued to languish well below 100 percent. Indeed, as of November 2014, indirect labor absorption was at only 70 percent—over 10 percent lower than the number that triggered terminations during the union campaign only months

[28] Respondent may argue that these high labor absorption numbers justify its decision to terminate the production employees. This argument, however, is rebutted by both the disparate treatment of employees who were *not* organizing, and the fact that Respondent had exceptional difficulty meeting its production numbers in the aftermath of these terminations. *See* discussion *supra*.

earlier. Yet, despite these low labor absorption numbers in the departments that were not organizing—including numbers that were well below the labor absorption rate that triggered the terminations in June and August—Respondent did not terminate any of the indirect employees. Respondent's disparate treatment of direct employees, who were organizing, and indirect employees, who were not organizing, demonstrates its unlawful motivations.[29]

Reviewing these numbers—which come from Respondent's own exhibits (RX 49 and 50), and according to Respondent's own witnesses are the best measure of labor productivity and efficiency—demonstrates that Respondent terminated its production employees *because* of their union organizing, not because of any issues with overstaffing. Labor absorption numbers in 2013 were significantly worse than in 2014, yet the only terminations occurred in direct proximity to the Union campaign in 2014.[30] Even within 2014, Respondent's labor absorption numbers for direct employees, who were organizing, versus indirect personnel, who were *not*

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[29] Further, assuming that the trend of direct labor absorption tracking indirect labor absorption were to continue in 2014, there is no evidence that terminations would have ever occurred in 2014 absent union activity. Comparing the indirect labor absorption numbers in 2014 to the wage labor absorption numbers in 2013 shows that both numbers bottomed out at around 70%--yet there were no layoffs of indirect employees in 2014, nor were there layoffs of production employees in 2013. Accordingly, while there are no metrics indicating exactly what Respondent's labor absorption figures would have been from July to November 2014 absent the terminations, a reasonable extrapolation of the existing figures from 2014 suggests that labor absorption would not have dropped below 70 percent—a figure which Respondent has previously recognized does not warrant laying off employees.

[30] Indeed, DiBiagio even admitted under questioning from Judge Goldman that Respondent *did not* terminate employees in 2013, despite projected labor losses: "*And when this budget was put together, they didn't budget any reduction in labor to flex with the sales -- reduction in sales*." (Tr. 1581 (emphasis added).)

organizing, tracked one another *until* the terminations. At this point, Respondent dramatically reduced its employees in the areas that *were* organizing, while doing *nothing* to reduce labor costs in those areas that were not organizing. This disparate treatment shows that, in fact, Respondent terminated the production employees because of their union activity.

b. Respondent's projected "downturn" was based on incomplete and unreliable figures

Respondent bases much of its defense on a projected downturn in orders that it expected to occur in the summer of 2014. For the reasons discussed below, these projections present an incomplete picture of Respondent's business, are fundamentally unreliable, indicate merely a short-term blip that is counteracted by Respondent's better-than-expected performance at the beginning of 2014, and do not reflect appropriate staffing levels as well as the labor absorption rates, discussed above.

As an initial matter, Respondent's backlog numbers are fundamentally incomplete as they are missing the undercarriage orders from Caterpillar. While Respondent's orders for its own machines may have decreased slightly, Caterpillar's orders greatly increased in 2014. Specifically, as of April, 2014, Respondent was projecting orders for over 2,100 undercarriages from Caterpillar for the year, versus a projected budget of only 1,500 orders. This increase in orders for Caterpillar undercarriages is particularly relevant to the layoffs here, as many of the major parts for these undercarriages are fabricated, welded, and painted in-house at Terex. (Tr. 996–98.) In addition, the spare parts constructed for these Caterpillar

undercarriages in-house are another important source of business for Respondent. This spare parts work also showed an increase above projections during 2014. *See* table *infra* pp. 63–64. The importance of these undercarriage orders to Respondent's business is established by Respondent's own Flash reports, which break out Caterpillar orders and spare parts separately from the general sales. (*See, e.g.,* GCX 84–95.)[31]

These projections also are not reliable. Respondent's own witnesses admitted that Respondent operates in a fluid business, and that temporary downturns like those experienced during the organizing campaign are commonplace. As explained by DiaBiagio to employees, "[I]t's not all doom and gloom. Business ebbs and business flows. We have some good times. We have some rough times." (GCX 53(b) at 29.) Terex Construction President George Ellis echoed these sentiments, stating that the products sold by Respondent are a fluid commodity and with varying orders, summarizing the state of affairs by saying "You never know when the football team is going to pull up in the bus at the McDonald's drive-thru to get an order." (Tr. 1101; 1083–84.)

Respondent's own projections of orders in June and July show the fluidity of its business. In May, Respondent's level load forecasts—which are supposedly frozen for the next three months—showed that Respondent was projected to

[31] Looking generally at the numbers in these reports reveals that these Caterpillar undercarriages and spare parts often contributed a significant portion of Respondent's profits in a given month. *See, e.g.,* GCX 89 (Caterpillar spare parts were 1.755 million dollars over forecast); GCX 91 (Caterpillar spare parts 738,000 dollars over forecast).

produce 9.4 machines per day in June and 9.9 machines per day in July. (GCX 57(b); Tr. 1273.) By June, Respondent's forecasts had changed dramatically, projecting that only 6.4 machines were going to be produced in July. (GCX 57(d).) It was this forecast that supposedly led to the terminations at issue here. Yet, by July, after the terminations, Respondent's business for July had somehow improved to 7.2 machines per day. (RX 41 at 3–4). These projections are consistent with the statements above, which indicate that Respondent often goes through swings in its orders, and that its projections are not necessarily a reliable indicator of future business levels.

Nor is this an isolated phenomenon. The fluidity and unreliability of Respondent's projections are clearly illustrated by comparing the projections for April 2014 with the actual production levels for that month. In February 2014, Respondent's Sales & Operations Planning (S & OP) report shows a projected build rate of only 7.7 machines per day. (GCX 59(i) at 5.) Yet, by April, Respondent actually ended up building 9.2 machines per day—almost a twenty percent increase over what had been projected only two months earlier. (RX 26 at 4.)

This temporary downturn must also be understood in the context of Respondent's business at the beginning of 2014. Respondent booked sales well in excess of its budget for January and February, and met its sales numbers for March and April. (GCX 8 at 4.) Perhaps more importantly, in January and February, Respondent actually turned a profit at a time that it was expecting to turn a loss (a projected loss that, as will be discussed in more detail below, was not going to be

accompanied by workforce reductions). (GCX 6 at 10.)[32] In April, Respondent booked operating earnings of $422,000, against projected earnings of $242,000. (GCX 88 (April Flash Report).) On April 16, DiBiagio announced to employees that Respondent's facility in Grand Rapids was the second most profitable facility in the Terex Construction Group. (Tr. 102; GCX 53(a) at 9.) At this same meeting, DiBiagio stated, "Our January, February to March, sales have been going up each month. This month should be pretty close to last month. April should be pretty close to March, much higher than we thought." Even going into May, Respondent turned a profit and sold more machines than forecasted. GCX 89 (May Flash Report) ("Sales of 153 units . . . were recorded in May against a forecast of 143 units.")[33] Indeed, as late as March, 2014, Respondent was actually looking to hire new production employees. (RX 17 at 102.) These statistics do not paint the picture of a struggling business hemorrhaging money; rather, they show that Respondent was experiencing an unexpected and virtually unprecedented run of success only a month prior to terminating significant portions of its paint and weld/fabrication departments.

Respondent will likely make two arguments to support the alleged decrease in business: one, by comparing backlogs in the summer of 2014 to backlogs earlier

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[32] As was discussed in the transcript, although these numbers are labeled for 2013, they are in fact the numbers to date for 2014. (Tr. 91–92.)

[33] The fact that Respondent did not meet its profit goals for May appears to be largely a product of "additional legal expense related to union organizing events." (GCX 89.)

in the year; and two, by pointing to open slots in the production calendar. Both of these metrics, however, are flawed and do not represent a comprehensive picture of Respondent's financial health.

First, with regard to backlog, this backlog does not account for increased Caterpillar orders. Perhaps more importantly, backlog does not necessarily correlate with orders. As DiaBiagio admitted, at times Respondent has run a high backlog not because of a large volume of orders, but because Terex has struggled to meet the orders that it has received. (Tr. 1540.) In other words, if Respondent wanted to prove a decline in orders, it should have presented evidence on orders—*not a flawed and limited backlog number*.

Second, Respondent will likely point to production calendars and emails for May, June, and July, showing that there were open build slots that were not filled by customer orders. However, as DiBiagio explained to employees in April, "Every month we have certain production plans, but we have a lot of what we call open slots. That means that we have plans to build these machines. We have components to build these machines. We just don't have orders for them . . . More often than not there are new orders that come in." (GCX 53(a) at 27–28.) Moreover, these open slots are a reality of a level loaded scheduling process in which orders are fluid and fluctuating. As Terex President Ellis explained:

> Q: When [customers] want things in March, April and May, TCA may have communicated those orders to you back in the fall before, right?

> A: Not in this business. It's not that robust. There are businesses within the construction world where it does play to what you just described, but this product is such a commodity. It's almost to -- you know, okay it depends on who has got what, when it's ready and what the price is, and that's when they will buy it. (Tr. 1083)

Ellis readily admitted that open slots are simply a daily reality in Respondent's business, given the level loading process and these fluid orders, noting that "[i]t's not for the faint of heart." (Tr. 1083.) Accordingly, the bare existence of open slots does not necessarily indicate that business is at a level that necessitates layoffs.

These bare production numbers also are not necessarily reliable indicators of appropriate staffing levels. They do not account for natural attrition or expansion of the workforce, due to hirings, terminations, or voluntary separations. Nor do they account for the actual labor required for the machines that are being produced. The metric that encompasses all of the factors related to labor costs is, by Respondent's own admission, the labor absorption rate. And this rate, as demonstrated above, belies the suggested business justification for these layoffs.

At best, these numbers paint an at best unclear picture of Respondent's business conditions in May and June when it was making the decision to terminate employees. The firsthand accounts of employees in paint, weld/fab, and assembly, however, show that the alleged downturn was not reflected in the day-to-day work of employees. Paint lead Kerry Esler, who was terminated in August, testified that things continued to remain busy in the paint department throughout the summer of 2014 despite a slight decrease in skid steer loader orders. (Tr. 686.) Painter Steve

Kruk testified that, although there was no decrease in small parts work in the paint department, the other two painters that he worked with in small parts were terminated in June (Tr. 738–40.) Painter Rick Andrews testified that he was so busy before his termination in August that "[t]here wasn't time to hardly get a drink of water" (Tr. 790–91) and that when he found out in July that three more painters would be terminated in August, he was "shocked." (Tr. 802.) Lee Kostal, who painted primarily in the large booth, testified that he "didn't notice any kind of reduction in work" leading up to the June terminations (Tr. 830), and that in fact work picked up between the June and August terminations because paint was so busy with increased Caterpillar orders. (Tr. 835.)[34] Welder Tony Knight testified similarly regarding the work in the weld department, noting that work was not slow in the area that he worked. (Tr. 927.) In addition, assembly lead Nick Baker also provided testimony showing that the work level in assembly remained high throughout the period of layoffs. (Tr. 999.) Respondent, through its managers and employees, did nothing to rebut these accounts of busyness amongst employees.

As General Manager DiBiagio told employees, "I always triangulate. I always tell people to look at things from three different perspectives. It's like a three-legged stool and then you'll really know the story. Don't look at one number.

[34] Respondent will likely attempt to counter this testimony by pointing to testimony from painter Dale Persson. Persson, however, did not testify about the overall level of work in the paint department, only that skid steer orders appeared to be down and that if "large parts" were outsourced, it would decrease the work in the paint department. (Tr. 764–66.) And, as will be demonstrated below, this outsourcing of work was itself unlawfully motivated.

Don't look at two numbers. Always try to look at three numbers that can kind of triangulate in and tell you exactly [ ] what's going on. Because you can make any number look good and make any number look bad." (GCX 53(b).) Similarly, a simple look at backlog and open order slots does not provide a full account of Respondent's financial health. Rather, a comprehensive look at all the orders placed with Respondent—including an increase in orders with Caterpillar, the credited testimony of employees, and the labor absorption rate reveals that Respondent's alleged downturn in business did not in fact motivate the terminations.

c. Even based on its handpicked numbers, Respondent's actions are inconsistent with its past practices

Even relying on the flawed backlog and open orders numbers, Respondent's treatment of other recent downturns in these numbers indicate that the terminations here were motivated by anti-union animus, and not by any alleged downturn.

For example, a review of Respondent's operations in the fall and winter of 2012–2013 reveals that Respondent was overstaffed and missing its projected budget numbers, and yet did not lay employees off. For example, in the October 16, 2012 S & OP report, Respondent's "people power chart" indicated that they were 12 employees overstaffed for the 6.5 machines per day that were being built in September 2012 (87 actual employees vs. 74.9 required employees for production levels). (GCX 59(a) at 12–13 (noting that production rate for 10/1/12 was 6.5).) Despite this overstaffing, no employees were laid off. This overstaffing is

particularly confusing, as Respondent's budget and backlog that fell far below projected numbers for the remainder of 2012. (*Id.* at 15–16.) Indeed, even as Respondent continued to miss its projected budget from the fall of 2012 into the beginning of 2013, it continued to hire more employees. (GCX 59(c) at 4, 18, 21–22 (backlog by month charts).) In February 2013, Respondent continued to ramp up its hiring plan in fabrication, despite the fact that it was already 30 percent overstaffed in that area. (GCX 59(e) at 6, 8, 18.) All told, these numbers show a pattern of personnel practices that do not closely track with business levels.

Indeed, the manner that Respondent has handled other projected downturns in 2014 indicates that the terminations that occurred around the union elections were motivated by union animus. In this regard, in late 2013, Respondent was projecting a drop in business for January and February 2014, such that it would be overstaffed in production areas. However, rather than plan to permanently terminate some employees, Respondent instead planned to briefly halt production for a few days. (Tr. 1591, 1655; GCX 53(a) at 3; GCX 53(b) at 24.) In explaining why Respondent was going to shut down at that time (instead of permanently lay off employees), DiBiagio explained that they were intending to shut down the plant, if necessary, "to keep everybody intact." (Tr. 1591.) Given Respondent's documented difficulties in hiring painters and welders in particular (discussed in more detail *infra*), it makes sense that Respondent would be loathe to lay off these skilled employees. *What does not make sense, however, is the quick trigger that*

Respondent pulled in laying off these same skilled and difficult-to-hire employees during an alleged downturn in June and July.[35]

Respondent's quick trigger in terminating paint and weld/fab employees in the face of union activity is especially troubling when considered in light of Respondent's past hiring and personnel practices. First, it is well established that Respondent has had difficulty hiring and retaining welders and painters due to the skilled nature of the positions. As testified to by HR Manager Deb Schultz with regard to the welders:

> Q: Terex has a hard time finding welders, don't you?
> A: It's been a challenge.
> Q: So it would be as Senior HR Manager, conventional wisdom would be it would be wise to hang on to an experienced welder if you had one, is that right?
> A: That's correct.
> Q: Okay, even if it meant putting him in an assembly job below his skill level for a while?
> A: That's correct.
> (Tr. 426; *see also* GCX 59(c) at 18 (indicating difficulty hiring welders).)

Similarly, Paint Lead Kerry Esler, who was involved in the hiring process for painters before his termination, testified that Respondent would often have to "go

[35] In addition, Respondent's actions post-termination further betray that it was union activity, and not a downturn in business, that motivated the terminations in June and August. In this regard, Respondent indicated in an September 2014 Town Hall meeting with employees—after the assembly election had concluded, and after laying off over half of the employees in the painter unit that voted in favor of the Union—that although orders and backlog were (allegedly) "not good," there were no "additional planned layoffs or shutdowns." (RX 51 at 7.)

through 50, 60 applications to maybe get one or two painters." (Tr. 696.) General Manager DiBiagio also admitted that, due to the geographical area in which Respondent is located, and competition from other industries, Respondent has difficulty finding qualified painters and welders. (Tr. 104–05.) DiBiagio similarly told employees, at team meetings, that Respondent simply would not be able to expand its paint and weld/fab operations due to the lack of skilled workers. (GCX 53(a) at 11.)

By contrast, much of Respondent's other production work, particularly in assembly, is quite low-skilled and fungible. As testified to by undercarriage lead Nick Baker, "I can take somebody with basically no experience and put him to work fairly quickly." Tr. 999. Respondent's managers admitted that assembly employees are often hired without any prior assembly experience. (Tr. 104–05; 418–19.)[36] Respondent's records of temporary employees indicate that the vast majority of temporary employees that it hires are for the assembly department. (GCX 32.) According to Respondent's production control manager, all assembly employees share the same basic skills. (Tr. 1426). A review of Respondent's most recent job opening in assembly, GCX 33(a), reveals that only the following limited and generally inchoate qualifications are required:

- High school diploma or general education degree (GED); or six to twelve months related experience and/or training...
- Ability to read and comprehend simple instructions...
- Mechanical aptitude
- Detail oriented

[36] This belies Schultz's claim that a welder with 17 years experience would be unable to complete any jobs in assembly. (Tr. 424.)

- Proven traits in dependability, initiative, energy, and proficient in time management.
- While performing duties of this job, the team member is regularly required to stand; use hands...The employee is frequently required to walk. The employee is occasionally required to climb or balance...The employee must frequently lift and/or move up to 40 pounds. Specific vision abilities required by this job include close vision, depth perception, and ability to adjust focus.

In short, assembler positions, in contrast to paint and welding/fabrication positions, are low-skilled, fungible and do not require prior experience.

In light of these considerations, it is no surprise that Respondent has a history of transferring employees from other departments into assembly to deal with production variances. As General Manager DiBiagio admitted, "As the work shifts from one area of the plant to another we can -- we shift our team members from one side of the plant to the other." (Tr. 135.) Respondent relied on this very argument in the representation case hearing related to this case that expanded the undercarriage unit to include the entire assembly area. (Tr. 135–36.) HR Manager Deb Schultz also admitted that there was "interchange" between the welding and assembly departments at Terex. (Tr. 424.) Indeed, General Counsel Exhibit 98 shows no less than 9 welding and fabrication employees who had been transferred into assembly departments between November 2013 and February 2014.[37] (*See also* GCX 99-indicating a large number of employees transferring into assembly in July 2014).

[37] Test track is generally considered part of assembly by Respondent. (*See* GCX 38, GCX 40.)

However, when employees chose to organize, the notion that they would be transferred to other departments went by the wayside. Not a single painter was transferred to another department, despite the availability of entry-level positions in assembly. Indeed, according to Hoeschen, there was not even discussion of transferring the highly-skilled painters (who just, by happenstance, were voting in an election the next day) to entry level assembly positions. (Tr. 390.)[38] And while several welders and fabricators were transferred to other departments, these transfers were done irrespective of actual assembly experience—instead, they were based on a clearly pretextual and flawed matrix of *welding and fabrication* skills. (Tr. 130–32.) Accordingly, Respondent's refusal to transfer paint employees, and the nonsensical manner in which it transferred welding and fabrication employees, suggests that these actions were motivated by union activity, and not legitimate business needs.

d. To the extent its projections were reliable, Respondent was aware of the projected downturn well before the union activity and acted contrary to these projections

To the extent that Respondent's asserted termination decision relies on projected business downturns, Respondent was aware of a projected downturn in 2014 well before the Union activity at issue in this case. Namely, in its July 2013 S & OP report, Respondent noted that its skid steer orders for the first quarter were

[38] Respondent will likely argue that there is not a past practice of transferring painters into assembly as a way to rebut this argument. This point, however, ignores that some painters, like Kerry Esler, already had experience in other areas yet were laid off. It also ignores that painting is a highly skilled area in which it is difficult to hire employees, while assembly is, by all accounts, a low skilled entry level position where it is relatively easy to place inexperienced employees.

projected to be light. (GCX 59(e) at 8.) Respondent further projected that orders would be lower in 2014 than in 2013 in its August 2013 S & OP. (GCX 59(f) at 9 (1,879 machines in 2014 as compared to 2,361 machines in 2013).) By September 2013, Respondent was projecting its projection level for 2014 to be about 1,639 machines—about where production levels ended up in 2014. (GCX 59(g) at 8.)

One would think, given Respondent's response to its projections in the aftermath of its employees' Union activity, that Respondent would at least be discussing the possibility of future layoffs in the fall of 2013. That assumption, however, would be incorrect. Rather than talking about layoffs in response to these projections, Respondent actually looked to hire employees throughout this period of time. (GCX 59(e) at 15; GCX 59(f) at 16; GCX 59(g) at 17.) Respondent's behavior in September 2013 is particularly noteworthy, as it that point it was projecting about 1600 machines for 2014 (about a 700 machine decrease from build levels in 2013, and 200 machines less than was projected in June 2014, when termination decisions were being made), *yet it was looking to hire an entire second shift of painters*. (GCX 59(g) at 8, 17; *see* RX 36 at 4.) Indeed, even coming into the beginning of 2014, Respondent's projections continued to indicate a downturn in orders—yet it still sought to hire more employees. (GCX 59(h) at 8, 13; GCX 59(i) at 9, 15.) Therefore, Respondent's actions during this period suggest that it has, prior to the instant Union activity, staffed its facility without regard to projected production levels.

Indeed, despite being aware of projected downturns for many months, Respondent continued to assure employees as late as April 16 that there would be no upcoming layoffs. At his April 16 Town Hall meeting, DiBiagio repeatedly reassured employees that there was "enough to keep us going and enough to keep us busy," that the plant had "turned a corner, big time" after years of losing money, and that employees were "not in danger of losing jobs or anything like that" despite the fact that orders looked low going forward and Respondent had open slots in its production schedule in the upcoming months. (GCX 53(a) at 4, 9, 12; *compare with* RX 18 at 6 (noting open slots going forward).) The incongruity between these statements and the projected downturn indicates that it was a factor other than a projected downturn leading to the terminations—that factor being employees' union activity.[39]

e. Respondent's struggling operations in the aftermath of these terminations demonstrates that they were not motivated by legitimate production concerns

After terminating these employees, Respondent's operations displayed all of the prototypical signs of an understaffed operation. Its production was unable to keep up with the schedule. It was forced to run overtime, including in those departments where it had laid off employees. Errors increased in departments in which terminations occurred. And, eventually, Respondent hired new temporary

[39] To the extent that Respondent relies on later numbers to suggest that layoffs were inevitable, this reliance should be discounted. It is as unlawful for an employer to *accelerate* terminations in the face of union activity as it is to *engage in terminations in the first place. See, e.g., Eddyleon Chocolate Co.*, 301 NLRB 887, 890.

and full-time employees—without making any attempt to recall those experienced employees who had been laid off. All of these factors further suggest that Respondent's actions were motivated by Union activity—not by any legitimate business needs.

A comparison of Respondent's production reports before, during, and after the decisions to terminate reveals that Respondent was unable to keep up with production demands. As explained by Respondent's managers, the daily production reports contain a monthly tally of the number of machines that are past due on a given day in the upper right hand corner. (Tr. 1738, 1740–41, 1951.) These reports show that, at the beginning of the year, Respondent was generally building to schedule, or at times even ahead of schedule. (GCX 61: January 2 report; January 31 report; February 3 report; April 30 report (production reports for January, February and April showing negative past due numbers).) However, at the time of the terminations in June, Respondent was well behind schedule, with 39 machines past due. (GCX 61: June 18 report; June 26 report). And, at the time of the second round of terminations in August, Respondent was 42 machines past due. (GCX 61: August 15 report). After these two rounds of terminations, Respondent continued to have difficulty keeping up with production, oftentimes running 25 to 40 machines overdue despite scheduling numerous overtime shifts. (GCX 61: August 21 report; August 22 report; September 16 report; September 19 report; October 23 report;

November 21 report; November 24 report.)[40] This demonstrated inability to keep up with production further indicates that the layoffs were not motivated by business justifications.

In addition to these production deficiencies, Respondent ran overtime with its production employees on a fairly regular basis after the terminations. As indicated by its posted overtime notices, Respondent ran Friday overtime in numerous departments on August 15, August 22, August 29, September 5, September 19 and November 14. (GCX 51(a)–(f).) Respondent's production reports indicate that there was also overtime worked on July 25 and November 21.[41] (GCX 61: July 25 report;

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[40] Curiously, despite running well behind schedule *during* the month, Respondent's numbers indicate that employees were somehow able to construct an almost superhuman number of machines on the last day of the month after the terminations at issue here. *See* GCX 61: November 26 report (28 machines built on November 26); October 30 report (23 machines built on October 30); September 30 report (27 machines built on September 30); August 28-29 report (26 machines built on August 28); July 31 report (20 machines built on July 31); June 30 report (17 machines built on June 30). Notably, these huge end-of-the-month production numbers generally did not appear *prior* to the layoffs. (*See* GCX 61: January 31 report (8 machines built on January 30); February 28 report (7 machines built on February 27); April 30 report (6 machines built on April 30); May 29 report (10 machines built); *but see* March 31 report (19 machines built on March 31). Respondent did not clarify or explain how employees were able to construct this many machines on a given day after the layoffs, despite the fact that Respondent recalled Production Manager Lori Gill in an attempt to explain away its production deficiencies after the terminations. These massive production jumps are especially curious in light of Respondent's workforce reductions (which would logically suggest an ability to build *fewer* machines). These inexplicable figures at least suggest that Respondent was adjusting its numbers at the end of the month to show that production goals were being met when in fact they were unable to keep up with production.

[41] Respondent normally does not have employees work on Friday, so the fact that machines were being produced these days indicates that employees were working. (Tr. 1739–40.)

November 21 report.) Employees at the first week of hearing also testified that there was mandatory plant-wide overtime scheduled for the first two Fridays in December. (Tr. 308.) All told, between the second round of layoffs on August 14 and the end of the hearing on December 12, Respondent required employees to work overtime over almost of the available Fridays (9 of 19 weeks). And, in addition to this mandatory overtime, employees also testified that Respondent offered voluntary overtime to employees in certain departments, including Respondent's election observer in the paint department. (Tr. 568–69, 694–95, 748–49.) This overtime has been accompanied by rehiring of temporary employees and the posting of fulltime job openings. (Tr. 420; GCX 31; GCX 33(a)–(b).) This volume of mandatory and voluntary overtime, along with the hiring of temporary and full-time employees, in the aftermath of the terminations casts further doubt on Respondent's asserted business justifications.

f. Even crediting Respondent's business justification, it still does not explain the extremely suspicious timing of its actions on the eve of the union election

As discussed above, Respondent bears a heavy burden in rebutting the General Counsel's *Wright Line* case. As demonstrated by Respondent's own labor absorption numbers, the flawed nature of the metrics it relies on, the disparate treatment of employees who were organizing as opposed to those who were not, the subjective accounts of employees, and its production difficulties after these terminations, Respondent's downturn argument appears to be illusory. Even crediting Respondent's implausible downturn argument, this alleged downturn *still*

does not explain the extremely suspicious timing of Respondent's actions. As the Board explained in *Eddyleon Chocolate Co.*, a business downturn does not provide an excuse to accelerate terminations ahead of a union election. Indeed, the Board's exposition on the legitimacy of a business downturn defense in the face of suspicious timing is particularly apt in the present circumstances:

> The Respondent's evidence may be sufficient to show that, as the season progressed, most, if not all, of the discriminatees would have been laid off for lawful economic reasons related to the production cycle. But the economic data in the record does not justify an accelerated layoff. Particularly where that precise form of retaliation—a layoff—was unambiguously threatened only days before it was carried out, much more is needed to show that the layoff at that time was for nondiscriminatory reasons.
>
> *Id.* at 890–91. *See also We Can, Inc.*, 315 NLRB 170, 172 (1994) (employer's failure to establish that it would have "what it did, when it did," absent employees' union activities, established 8(a)(3) violation).

At the very least, Respondent accelerated these terminations ahead of the union election, on the pretextual basis of a long-known and typical decline in business. This action is unlawful.

iii. Driven mainly by a longstanding zinc issue, Respondent's outsourcing does not provide a neutral justification for the terminations and is itself unlawful

Respondent also relies on the outsourcing of certain paint work as a justification for the terminations of employees. It is well-established that an employer cannot outsource work as a way to punish its employees' decision to engage in protected organizing activity. The evidence adduced at trial demonstrates that Respondent's rapid outsourcing of paint work in response to the paint department's organizing was unlawfully motivated:

- First, the outsourcing itself was primarily based on a pretextual zinc issue.
- Second, to the extent Respondent relies on cost or performance justifications, these are dubious and do not explain the timing of the outsourcing relative to the Union campaign.
- Third, the accelerated timing of the outsourcing suggests that it was motivated by the upcoming union election, and not by any legitimate business or pollution concerns.
- Fourth, to the extent that Respondent talked about outsourcing prior to union activity, this outsourcing was related to an *expansion* of business and was going to be offset by *insourcing* other parts—it was never discussed as a means to move work away from the paint department.
- Fifth, and finally, Respondent's aggressive outsourcing of paint work in the face of numerous defects and delays suggests that it was not motivated by legitimate business concerns.

Accordingly, this outsourcing was unlawfully motivated, and cannot be used as a justification for the terminations in the paint and welding/fabrication departments.

a. The zinc problem driving the outsourcing was longstanding and Respondent was planning on addressing it through means other than outsourcing

The zinc problem driving the outsourcing on the eve of the Union election was not a new problem. Respondent has been aware of the zinc pollution issues at the Grand Rapids facility since at least April 2009. At that time, Liesch, Respondent's third-party environmental contractor, sent a report to Respondent indicating that

its first wastewater sampling showed "zinc over the limit on all three sampling days as well as for the 3-day average," and that a second sampling showed "zinc above the limit on days 1 and 2 and for the 3-day average." (GCX 20.) By October 2011, Respondent, through Liesch, informed the MPCA about the unlawful zinc concentrations. (GCX 21.) As of September 11, 2012, Liesch began suggesting possible sources and treatment options to Respondent, noting that "pursuing treatment options to remove the zinc appear to be the best option at this stage particularly due to the *length of time of the facility has been out of compliance*." (GCX 22.) General Manager DiBiagio, who began managing Respondent's facility in February 2013, admitted that he was aware when he started that the zinc problem had been ongoing for several years. (Tr. 122–23, 1554.)

The MPCA began prosecuting these long-standing violations in the summer of 2012. It issued Respondent a formal Notice of Violation (NOV) on August 14, 2012, after conducting an inspection of Respondent's facility pursuant to a permit modification request. (GCX 30(h).) Pursuant to this notice of violation, Liesch, on behalf of Respondent, sent the MPCA a proposed compliance schedule in September 2012, committing Respondent to build a waste water treatment plant (WWTP) to deal with the zinc issue by September 2013. (GCX 30(i).) Despite Liesch's noting in an earlier letter that month to Respondent that this was a "relatively long" compliance schedule (GCX 22), the MPCA approved this compliance schedule in October 2012. (GCX 30(j).)

At the outset of these compliance efforts, Liesch was forthright with Respondent on the potential complications and expense of a treatment plant as a solution to the zinc problem. In discussing the treatment facility, Liesch noted:

> Liesch has estimated a cost of $300,000 for the design and construction of the treatment system. . . . . A contingency of 20% has already been added to the $300,000 estimate . . . Issues such as space requirements, changes in equipment costs, and the complexity of treatment required could increase costs above the $300,000 estimate. Liesch's best estimate at this point in time is that a range of costs from $225,000 to $400,000 would likely cover best case to worst case scenarios. . . (GCX 22.)

After receiving this estimate, however, Respondent began devoting serious resources to the creation and construction of a WWTP. Around the time that Respondent received this notice of violation, Respondent modified the plumbing from its two wash bays into one discharge point. (Tr. 209; GCX 22.) After combining the discharge points, and receiving the formal NOV, Liesch devoted more serious efforts towards the WWTP. Beginning in the spring of 2013, and extending throughout the summer of 2013, Liesch solicited numerous bids from third-party contractors to develop appropriate treatment solutions and equipment to resolve the zinc issue. (GCX 23(a)–(i).) While soliciting these bids, Liesch developed blueprints for what the final facility would look like and how that facility would fit into Respondent's plant. (Tr. 192–94; GCX 29.) All told, by January 2014, Liesch represented to the MPCA that, over the years it had spent on the zinc problem and developing the WWTP, it had spent over $56,000 of Respondent's money on compliance efforts. (GCX 30(q).)

In addition to these tangible expenditures, Respondent constituently represented to the MPCA after the initial NOV that it was building the WWTP. As discussed above, its initial response to the NOV in September 2012 stated that the issue would be dealt with through a WWTP. In December 2012, Liesch updated the MPCA with the results of zinc testing, noting that these results "will be used for the design of a treatment system." (GCX 30(l).) In February 2013, Liesch informed the MPCA that it was moving forward the approved schedule of compliance by designing the treatment system. (GCX 30(n).) In November 2013, after the initial deadline for construction of the WWTP had passed, Liesch requested an additional time to complete its already lengthy compliance schedule due to "unavoidable delays in the project." (GCX 30(o).) In January 2014, Liesch proposed a new compliance schedule, due to delays with the construction of the WWTP and an addition to the facility. (GCX 30(p).) Later that same month, Liesch sent another letter to the MPCA, noting the various efforts that Liesch had taken in furtherance of creating a WWTP to deal with the zinc issue. (GCX 30(q).)

The unifying thread in all of these communications between the MPCA and Liesch, on behalf of Respondent, is their singular discussion of a WWTP. No other option is discussed, even as construction and engineering delays that are *unique* to the WWTP push back compliance. For eighteen months, Respondent represented to the state that it was building a WWTP as *the* solution to the zinc problem.

In response to these prior representations, and Respondent's continual delay in meeting its stated compliance dates (discussed in more detail below), the MPCA

sent a formal schedule of compliance to Respondent on March 31, 2014. (GCX 30(r).) Given the singular focus of the prior discussions between the parties, this formal schedule of compliance unsurprisingly referenced the construction of a WWTP as the solution required in the schedule. (GCX 30(r) at 4–5.) Liesch explained to Respondent on March 31 via email that the schedule required the installation of a WWTP by July 1, and that if Respondent did not have the plant completed by that date, it would face fines. (GCX 26.) Between March 31 and April 7, Respondent and Liesch exchanged more emails regarding the schedule of compliance, focusing mainly on the fact that the schedule referenced Todd Witherall, a manager who was no longer at the facility. (*Id.*) In these emails, there was no discussion about moving away from a WWTP to other potential compliance solutions.

On April 7, the Union began its first handbilling at the plant. It was only after this organizing activity began that Respondent first considered other options besides the WWTP in its communications with the MPCA. About a week after this handbilling, Respondent, Liesch, and the MPCA held the first of two conference calls. According to Liesch, these conference calls are not commonly part of the compliance process with MPCA. (Tr. 224–25.) In these conference calls, the parties discussed various options for compliance with the zinc problem—including, for the first time, outsourcing paint work as a solution. According to both notes of these conversations, and MPCA official Loeglin's recollection, outsourcing was one of several potential options discussed for resolving the zinc issue. (RX 1–2; Tr. 277.)

Interestingly, despite the fact that Liesch had been working on the zinc issue for years with the MPCA, Respondent did not notify Liesch about the outsourcing option prior to these calls. (Tr. 234.) According to Logelin, the main focus of the conversation was not on outsourcing, but rather whether Respondent could adjust the chemicals it used to limit the zinc output. (Tr. 277–78.) Consistent with Logelin's recollection, Liesch followed up with Logelin via email at the end of April, discussing different chemistries that could potentially be used in the paint department. (GCX 30(s).)

On May 9, the Union election petitions were filed in the paint and undercarriage departments. Three days after these petitions were filed, Liesch submitted its first written, formal response to the March 31 schedule of compliance establishing the WWTP. In this May letter, Liesch formally indicated, for the first time, that Respondent was abandoning the WWTP in favor of outsourcing and other options. (GCX 30(t).)[42]

After almost 18 months of work on the WWTP, Respondent flipped its position only days after the filing of election petitions. This incredibly suspicious timing suggests that it was employees' Union activity, and not the zinc problem, that drove the decision to outsource work, and the subsequent impact that this outsourcing had on the employees in the paint and weld/fab departments.

[42] That Liesch remained involved with the MPCA until May 12 further suggests that it was not seriously considering outsourcing until this date. Liesch's role in this zinc pollution was to develop a WWTP; when Respondent rapidly flipped towards an outsourcing solution, however, it stopped consulting with Liesch on the zinc issue. (Tr. 235–36.)

According to Respondent, the decision to abandon the WWTP in favor of outsourcing—coincidentally at the same time its employees expressed interest in the Union—was based on two factors: first, that the WWTP would actually create hazardous waste; and, second, that the WWTP would be expensive. (Tr. 1556.)

A close examination of these justifications revealed that both are pretextual. DiBiagio claims that, due to his previous manufacturing experience in other facilities, he was able to instantly determine that the WWTP would cause the facility to become a hazardous waste producer:

> And, you know, I have been -- I have run chrome-plating facilities as part of some of these factories I have run. Obviously, I have made car batteries with lead and acid and that sort of thing, so I am very familiar with waste, in terms of sludge, in particular, and some things like that. And I am very familiar with those types of systems. So I asked them to, you know, lay out what kind of system he was talking about.
>
> When [Liesch] described the system, it is a very—it is not overly complicated, but it is a system that included filter presses, which are very dirty, and it also included sulfuric acids as part of the treatment process, along with some polymers, to treat the material and the water. And I am familiar, to some extent, with those systems, and they *actually generate a hazardous waste* as a by-product of those systems, which you have to collect and dispose of accordingly. (Tr. 1556.)

DiBiagio's background, however, is in operations. (Tr. 1538–39.) It does not include any expertise in WWTPs, engineering, or hazardous waste. By contrast, the person who possessed the expertise in this area, indeed was being paid by Respondent specifically to deal with the zinc issue and develop a WWTP—Travis Knisley—testified that in fact it was unclear whether the WWTP would actually produce hazardous waste:

> Q And is it true that -- if, in fact, a waste water treatment facility had been built that it would, in fact, generate or produce hazardous waste?
>
> A It's unknown depending on the amount of different metals that collect in the sludge that's settled out of the waste water. There would have had to have been a formal profile done of the sludge after it was produced to determine whether or not it was hazardous. (Tr. 211–12; *see also* GCX 23(h) at 1–2 (quoting WWTP as a nonhazardous waste producer).)

This demonstrates that, at the very least, Respondent's stated concern about hazardous waste production are overblown—if not illusory.

The timing of these hazardous waste concerns *vis a vis* the actual changes also indicate that they are pretextual. According to DiBiagio's own suspect account, he became aware of these hazardous waste issues when he became involved in the project in the fall of 2013. (Tr. 1555–56.) Even assuming that DiBiagio's concerns about the hazardous waste are genuine, his own account shows that Resppondent continued spend money on developing a WWTP for months thereafter, and only changed course to outsourcing after its employees began expressing interest in joining a union. This suggests that another factor, beyond the supposed hazardous waste issue, drove the transition from a WWTP to outsourcing.

Similarly, the cost issues related to the WWTP were longstanding, and existed well before the change to outsourcing. DiBiagio cited these costs as the second reason for the shift away from a WWTP. At the outset, however, Liesch informed Respondent in September 2012 that the WWTP could potentially cost up to $400,000 dollars. (GCX 22.) Despite knowing this information at the outset, Respondent continued to devote significant resources to the WWTP, as outlined

above, for over 18 months. And DiBiagio himself admitted that he was aware of these costs at the latest by the fall of 2013. Accordingly, the cost justification rings untrue.

Additionally, this is not a situation where cost estimates kept rising. Quite to the contrary—as the facility progressed, Liesch actually dropped the cost of the estimate to $250,000 by January 2014. (GCX 30(q).) Again, despite the long-term knowledge about the costs, and an actual drop in costs from the initial estimate, it was only the onset of union activity that caused Respondent to abandon the WWTP.

The effectiveness of the proposed solutions also suggests that the zinc problem was merely a pretextual justification for the increased outsourcing. Liesch conducted an exhaustive investigation into potential solutions for the zinc issue, and after this investigation, developed a WWTP that *would solve the zinc issue*. Liesch consultant Knisely, in discussing the treatment chemistry that was developed for the WWTP, testified that "[w]e did jar testing with multiple days of water from Terex back at Liesch and just proved that it worked on all days that—of all different types, or different days of waste water discharge because they varied from day to day. . . [T]he treatment recipe was a success." (Tr. 200.)

By contrast, Respondent's ad hoc and belated suggestion of outsourcing as a solution to the zinc problem was unlikely to work from the outset and was unproven. In its communications with the MPCA, Respondent suggested that outsourcing would reduce the volume of water being produced at the plant. (*See* RX 1.) Reducing the *volume* of wastewater being produced, however, would not by itself

affect the zinc pollution issues because the MPCA was concerned with the *ratio* of zinc to wastewater, not the overall volume of zinc being released.[43] (*See* GCX 30(r) at 4–5 (expressing permissible zinc levels in milligrams per liter).) And, in contrast to the months of testing for the WWTP, there is no evidence that Respondent conducted *any* tests about how reducing the volume of waste water would affect the zinc issue.[44] Given these considerations, it is unsurprising that, even to this day, Respondent has been unable to achieve compliance with the MPCA regarding its

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[43] Respondent may argue that its zinc problems were somehow more attributable to the large wash bay and the specific parts that were outsourced. This argument should be rejected for several reasons. First, as referenced in numerous communications, Liesch was unable to identify the source of the zinc. (*See, e.g.*, GCX 20 ("Other avenues of investigation have not revealed a source of zinc."); GCX 22 ("Terex has spent time investigating the source of the zinc in the wastewater and has not found a source of the zinc."); *see also* GCX 30(i) ("the large wash bay WS001 has recently been tested and was in compliance" with zinc limits).) Therefore, any notion that adjusting the ratio of small to large wash bay waste water would solve the zinc problem was merely speculative. Second, as discussed by the painters in this case, Respondent continued to utilize the large wash bay that was supposedly creating the zinc problem *even after the outsourcing*. (Tr. 771.)

[44] DiBiagio's self-serving reference to a conversation with Liesch in the spring of 2014 (Tr. 1589) in which Liesch told Respondent that outsourcing would solve the zinc issue should not be credited. First, DiBiagio claims, contrary to Knisley's sworn testimony at hearing and the actual testing results, that the WWTP would not have solved the zinc problem. (*Compare* Tr. 1589 with Tr. 200.) Second, Knisley, a neutral in this dispute, testified that the first conversation regarding outsourcing took place in a conference call with the MPCA. (Tr. 234.) His notes from this conversation do not address the validity of the outsourcing as a solution, merely that Respondent was considering it as an option. (RX 1–2.) Third, Respondent failed to call Justin Fischer, Respondent's representative who was most intimately involved with Liesch and the MPCA regarding the zinc issues. (Tr. 1650–51.) Respondent's failure to call this admittedly available witness should raise an inference that his testimony, like Knisely's, would have contradicted DiBiagio's account. *Flexsteel Industries*, 316 NLRB 745, 757–58 (1995), *enforced*, 83 F.3d 419 (5th Cir. 1996) (discussing adverse inference based on failure to call witness likely to be favorable to Respondent's case).

zinc levels. (Tr. 264.) In short, rather than adopting a proven, well-tested solution, Respondent invoked an ad hoc, untested, and logically untenable outsourcing "solution" to a long-standing zinc problem that just, by coincidence, led to the termination of a large number of its production employees who had only recently started expressing support for the Union.

Finally, as a rebuttal to the incredibly suspicious timing of its outsourcing efforts, Respondent makes the frankly incredible assertion that an isolated outsourcing experiment in the fall of 2013 was related to the zinc issues. (*See* Tr. 1558, 1697.) While Respondent undisputedly explored outsourcing work at this time (RX 53–57), there is no connection on the face of these documents to any zinc issue. Nor is their any suggestion in these documents that Respondent is planning to engage in some grand outsourcing of all the work in the large paint booth.[45] Rather, it appears to be an isolated outsourcing effort to determine the feasibility of painting these specific products outside Respondent's facility—an effort that, it should be noted, was consistent with Respondent's past practice of having certain parts painted outside its facility. (*See* Tr. 1645 (noting that forestry cab painting had been outsourced since 2013), 1698.) In contradiction to this vague documentary

[45] Indeed, if Respondent *were* considering such a plan at this time, it would make sense to disclose it to Weisgram. The natural increase in business for Weisgram that would accompany such a large outsourcing of Respondent's work would presumably increase Weisgram's motivation in accommodating Respondent's limited outsourcing in the fall of 2013. Yet no such communications were made, according to Respondent's documentary evidence.

evidence and these self-serving assertions,[46] Respondent's communications with the MPCA convincingly establish that the *only* solution being considered at the time for the zinc problem was the WWTP. (*See, e.g.,* GCX 24.) As discussed above, these communications make *no* reference to outsourcing, or any other solution beyond the WWTP. The first documentary evidence even suggesting outsourcing as a potential solution to the zinc issue is from April 2014, months after the outsourcing in September 2013. Further, even crediting this incredible testimony, Respondent's efforts in the fall were isolated and exploratory in nature; they do not establish that, at that point, Respondent had (contrary to its assertions to the MPCA) decided on outsourcing as a solution to the zinc issue. Indeed, the only evidence suggesting that outsourcing was even being considered as an option *in lieu* of the WWTP occurs in April—after the onset of Union activity. And the first evidence showing that outsourcing was going to be *the* solution is from May 12—3 days after the election petitions were filed.

Respondent's blatant disregard of its legal obligations under state and federal pollution laws further shows that this zinc issue was a convenient excuse to harm employees in response to their union activity. Respondent was aware of its zinc problem since 2009, and had been issued a notice of violation by the MPCA in 2012. Yet, the evidence establishes that Respondent did not treat its obligations to follow

[46] Respondent's failure to call Justin Fischer, and the adverse inference flowing therefrom, should also be applied to DiBiagio's and Hoeschen's testimony regarding the outsourcing.

the law seriously until the onset of Union activity on April 7.[47] At that point, Respondent engaged in two ad hoc conference call—including, for the first time, involving General Manager DiBiagio—and set a new and aggressive compliance schedule that conveniently led to the outsourcing of work that would support the termination of the employees who were organizing. (GCX 30(t).) This long-term condonation of a legal violation suggests that it was something other than the legal violation that led to the outsourcing. Given the timing of the outsourcing solution relative to employees union activity, the answer is clear.[48]

Additionally, one would think that if Respondent's hastened efforts to solve the zinc problem through outsourcing were sincere, it would certainly have signed the proposed outsourcing schedule of compliance by December 2014 and would be in compliance with the zinc emissions required under law. This assumption would be wrong on both accounts. As testified to by MPCA representative Logelin:

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[47] Admittedly, Respondent was paying Liesch to solicit quotes and deal with the MPCA during this time. Respondent, however, never took any direct steps to ameliorate the zinc pollution issue. Rather, it continued to push for extensions on the compliance schedule, up until compliance with the zinc pollution issue provided convenient cover for terminating employees who were organizing.

[48] Additionally, Respondent did not list the zinc issue as a basis for the decision to terminate in its meetings with employees. (Tr. 761, 783–85, 843–44, 963.) The only allegedly contemporaneous document listing the zinc pollution as contributing to the terminations is Respondent Exhibit 66. This document, however, constitutes inadmissible hearsay. It is an out-of-court statement that Respondent is attempting to use to *prove* the truth of the matters asserted therein—namely, that Respondent relied on the zinc pollution as a justification for the termination of the painters and welders/fabricators. And, as noted by the judge during the hearing, Respondent failed to establish that this document was created and kept during the normal course of business. (Tr. 1837.) Finally, the document should not be given any dispositive weight. It is an undated account, suspiciously written in the third-person, and supposedly attached to an email (GCX 13) that is *missing* any indication of an attachment.

> Q: And what's marked as GC 30(u), that's the revised schedule of compliance that we've already discussed today, is that right?
>
> A: Correct. This is our current version of the unsigned -- so this is still in draft form. We haven't -- have not got it back signed or we haven't signed it as well.
>
> Q: And so they remain out of compliance?
>
> A: Currently the last monitoring reports that I have gotten were still out of compliance with zinc, yes. (Tr. 264; *see* Tr. 1649–50.)

Respondent's attempts to use its long-standing zinc problem as a sword against employees' protected activities cannot be allowed to stand. Respondent's only concrete effort towards complying with its zinc problem—the outsourcing of paint work—coincided *directly* with employees' union activity. For years before this union activity, and *months after* the threat of union activity had passed, Respondent otherwise disregarded its legal obligations to comply with permissible zinc levels. Respondent was content to violate state and federal pollution laws, until those laws provided a convenient excuse for violating federal labor law. As recognized by the Board in other contexts, an "11th-hour concern" with legal obligations on the eve of union activity cannot be used to establish a defense under *Wright Line*. *Concrete Form Walls*, 346 NLRB 831, 835 (2006), *enforced*, 225 Fed. App'x 837 (11th Cir. 2007); *see also Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999) (rejecting defense in part because "the Respondent's attempt at strict compliance with eligibility requirements as to these employees, though arguably proper under immigration law, was contrary to its practice both *before and after* these discharges.") (emphasis added). Similarly, Respondent's newly found (and quickly discarded) concern for

seriously dealing with a long-standing zinc problem via outsourcing on the eve of the union election was unlawfully motivated.

b. Respondent's other justifications for the outsourcing are similarly pretextual and do not explain the suspicious timing of the shift

Respondent may also attempt to posit other justifications, such as the alleged superiority of a powdercoating finish or alleged cost savings derived from outsourcing. These should also be summarily rejected. As an initial matter, they do not explain the extremely suspicious timing of the outsourcing here. Even crediting Respondent's arguments on these two points—two points that the General Counsel will vigorously dispute below—the superiority of powdercoating and the cost-savings from outsourcing are not time sensitive issues. Outsourcing either saves money or it doesn't; powdercoating is a superior finish, or it isn't. They do not explain why Respondent engaged in a rapid and unprecedented effort to outsource a massive volume of painting work when it did—which just happened to be on the eve of the union election in the paint department.

In addition, there are serious questions regarding the alleged superiority of powder-coating as a finish. Although Respondent's witnesses at times asserted that powdercoating is a superior finish, they did not provide any systematic explanation as to *why* this was the case. In fact, the only detailed comparison of wet painting versus powdercoating in the record comes from General Counsel's Exhibit 65. RDM, one of Terex's outsourcing partners, conducted a study to determine which painting product would be best for the type of applications Terex was looking to

provide. In this report, RDM noted that several powdercoating suppliers refused to quote the parts due to cost considerations. (GCX 65 RDM Report at 1.) In addition, RDM noted that its research demonstrated that powdercoated parts often will have paint "POP" off or crack in the applications suggested by Respondent. (*Id.* at 2; *see also* GCX 65, June 4, 8:42 am email from Dennis Ross (noting powdercoating issues); GCX 70 (Weisgram refusing to powdercoat certain parts because of quality issues).) In light of these cost considerations and the overall issues with powdercoating in this application, RDM recommended a wet painting process as *the* superior process. *Id.* at 3. These considerations, at the very least, cast doubt on Respondent's self-serving suggestion that it is outsourcing because powder-coating is a superior finish.[49]

Respondent also will likely argue that outsourcing saves money. In support of this argument, Respondent will likely cite to a cost-comparison study that it conducted on three chassises outsourced with Weisgram. (RX 61.) This comparison, however, should not be credited. As the Charging Party pointed out, this estimate was missing a $ 24,000 cost for racks that would have to be constructed for the outsourcing. (Tr. 1794, CPX 12.) In addition, Hoeschen, who

[49] Respondent may point to the testimony of painter Dale Persson under cross-examination as evidence of an "objective" perspective on the merits of powdercoating versus wet painting. (Tr. 765.) This testimony should be discounted, as Persson was not experienced in the type of painting required at Terex (he had only been there eight months). (Tr. 759.) In addition, while Adam Hughes from Custom Products testified that it was his opinion that powder coating was a superior finish, he was unsure whether Terex agreed with that opinion. (Tr. 165.) In addition, it is undisputed that despite the supposed superiority of powder-coated paint, Respondent continues to touch up its products with *wet* paint, despite the fact that a wet paint finish looks different than a powder-coated finish. (Tr. 678–80.)

discussed the comparison at hearing, was unable to explain the basis of the labor cost figures that were used. (Tr. 1796–97.) Further, even discounting the unreliability of these numbers, they presents only a limited snapshot of Respondent's outsourcing costs. Respondent outsourced far more than the chassises for these three machines, (*see, e.g.,* RX 65) yet it did not enter evidence or discuss any cost comparisons for these other parts. Its failure to do so at the very least suggests that these numbers were not favorable to Respondent's case. Indeed, Respondent's numerous complaints about the high outsourcing costs further suggest that the outsourcing was not resulting in cost savings. (GCX 65 (April 25, 2014 12:23 pm email from Rich Lieske to RDM noting that "[t]he painted cost seem [sic] to be high."); GCX 69 (June 13, 8:40 am email from Rich Lieske to Problast noting that "We are looking at your paint costs on the loader & chassis and they are coming in high."); GCX 74 (June 16 11:30 am email from Travis Antilla to Innova noting that "quotes are on the high end."); GCX 82 (September 9 8:00 am email from Rich Lieske to Weisgram questioning "what is driving such a high cost for this chassis.").) Respondent's quality and cost-saving justifications thus do not ring true, as they are not time-sensitive and are rebutted by other record evidence.

c. Timing of Respondent's rushed outsourcing suggests that it was motivated by union activity

Between May 9 and June 18 (the date of the paint election), Respondent made clear to its suppliers that there was *some* future event that was driving a massive need to rapidly outsource its paint production:

- May 12, 2014 email requesting quotes from RDM "asap so we can get going on this project." (GCX 65)
- June 4, 2014 email to Innova stating "[w]e are under the gun to get these cabs coming to us painted, so the sooner the better." (GCX 67.)
- June 5 email to Weisgram indicating "[t]here is a big push to get these [loaders] in pained asap." (GCX 68.)[50]
- June 9 (high importance) email to Problast stating "We need to get the cost for you to paint these chassis's and loaders. Any chance you can get that to us by *this afternoon* (sic)." (GCX 69) (emphasis added).
- June 11 email to Innova apologetically stating "I know this is a rush but can you please have your subcontractors perform the necessary tests to be sure the parts are compliant with the Terex Paint Spec." (GCX 71.)
- June 12 "High importance" email from RDM to Respondent quoting painting for third party D & K powder coating. (GCX 72.)
- June 16 email to Innova questioning costs on outsourcing (GCX 74.)
- June 16 internal email requesting prints for loader arms to be "sent out right away." (GCX 77.)

These rapid and high-priority quotes are in stark contrast to Respondent's typical outsourcing efforts, which Respondent's witnesses admitted typically take "a while." (Tr. 1765.)[51] The rushed nature of this outsourcing in the lead up to the election suggests that it was the upcoming union election, and not any legitimate concerns, that drove the outsourcing of the paint work.[52]

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[50] This email also references an early June visit from Joan Hoeschen to discuss outsourcing of the painting work for loaders. (GCX 68) ("We are not ready to paint the loaders yet—we had a meeting with Joan yesterday when she was here.")

[51] Respondent's limited September 2013 bid solicitations are also in stark contrast to these emails. (RX 53–55). These solicitations did not reference being "under the gun," needing the quotes "asap," or apologizing for "rush[ing]" the supplier.

[52] In fact, Respondent also began exploring outsourcing with Weisgram only weeks after discovering employees' union activity on April 7. Respondent's highest manager took his first visit to one of Respondent's major suppliers, Weisgram, on April 18. (GCX 62; Tr. 1766.) In an email recapping that visit, Weisgram told Respondent that they were "excit[ed] to hear about the Terex's growth plans." (RX 62.) On May 7—only two days before the election petition was filed here—

Respondent's single-minded desire to outsource ahead of the election is starkly reflected in its exchanges with Weisgram in June. On June 11, Hoeschen called Weisgram to discuss the status of the outsourcing. On June 12, Hoeschen informed other managers at Terex of the following issues with the outsourcing at Weisgram:

- Weisgram was unwilling to powdercoat parts that were fabricated by RDM.
- Weisgram was unwilling to paint cabs due to "quality issues they have had in the past."
- Weisgram will be liquid painting (not powder coating) loaders using an outside company.
- Weisgram is pushing back SSL loader project to an undetermined date. (GCX 70.)

Despite this exchange, however, there was no discussion about reconsidering outsourcing or otherwise modifying its plans. And, of course, the complaints about high costs discussed above also did not dissuade Respondent from outsourcing. This further suggests that the Union activity drove the outsourcing.

d. Respondent's issues with the outsourced work belie any legitimate business considerations

This *ad hoc* outsourcing on the eve of the election is particularly suspicious in light of the past issues that Respondent had experienced with its suppliers' painting work. Respondent had once attempted to have its parts powdercoated by outside suppliers and had abandoned those attempts. (Tr. 703.) Custom Products

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Weisgram visited Respondent's facility, at Respondent's solicitation, to continue work on outsourcing. (GCX 64.)

Representative Adam Hughes admitted that his company had experienced a lot of difficulty, even prior to the increased outsourcing, in meeting Respondent's expectations and deadlines. (Tr. 152; GCX 16(a)–(f).) Respondent's email exchanges with RDM on the eve of the election also indicate that Respondent's prior experiences with the company had not been productive. (GCX 73.) Respondent's March 2014 S & OP report indicate that, just prior to this outsourcing, its suppliers at that time were struggling to meet delivery times. (Tr. 1296.) Yet, despite these concerns, Respondent sought to increase its work with these companies, and others, on the eve of the election.

It is perhaps no surprise that, in the aftermath of the election and this rapid outsourcing, Respondent experienced major issues with quality and timely delivery. Employees in the paint department testified that the powdercoated parts that they were receiving were damaged and of low quality. (Tr. 678–80, 743–44.) According to Painter Rick Andrews, "99 percent of them that are coming in powder coated got to be painted, fixed." (Tr. 794.) These issues were so great that Respondent began staffing two touch-up painters (Mitch Johnson and Eric Yeschick), instead of one (Dennis Feltus) as had been the case before the outsourcing. (Tr. 834.)

In addition, after the election, suppliers continued to experience issues with meeting Respondent's deadlines and quality guidelines:

- June 19 email from Weisgram indicating issues with rush orders; Respondent responds on July 1 by increasing lead times by 600 percent, from 1 week to 6 weeks. (GCX 76.)
- June 24 email from Respondent to Custom Products indicating that painted cabs were not at acceptable quality. (GCX 16(a).)

- July 23 email from Respondent to Weisgram indicating that parts scheduled to be coming in at the end of July were not going to be received until the end of September. (GCX 78.)

- August 14 internal Custom Products emails, prompted by calls from Respondent, questioning whether Custom Products would be able to begin sending painted cabs as scheduled by Respondent. (GCX 16(b).)

- August 15 Respondent email to Custom Products discussing issues with receiving painted cabs on time. (GCX 16(c).)

- September 9 email from Respondent to Weisgram complaining about high cost of outsourcing. (GCX 82.)

- September 9 email from Respondent to Custom Products indicating that Respondent has shut down its production line because it has not received painted cabs. (GCX 16(d).)

- September 9 email from Respondent to Custom Products indicating that Respondent has shut down two lines due to delays in receiving products. (GCX 16(e).)

- September 12 email from Custom Products to Respondent indicating that Custom Products was "struggling to keep up with [Respondent's] demand." (GCX 16(f).)

Respondent will likely contend that it could not have foreseen these after-the-fact issues with the outsourcing. Given Respondent's prior issues with outsourcing, discussed above, these contentions should be rejected. Even crediting these contentions, however, they still do not explain why, despite these issues, Respondent continued forward with its plan to lay off *three more painters in August.* Assuming that these layoffs were a product of the outsourcing of work, as Respondent contends, a rational business would cease or at least delay layoffs in the face of these difficulties. Here, because the layoffs were designed specifically to undermine and avoid bargaining with the newly-elected union, Respondent pushed

forward with the layoffs despite obvious difficulties with the outsourcing. This drives home that the layoffs were unlawfully motivated.

The increased outsourcing, and in particular those companies that Respondent was outsourcing with, are also in contrast to Respondent's stated goals *before* the union activity came into full swing. In this regard, General Manager DiBiagio told employees in April 2014 that one of Respondent's goals moving forward was to consolidate its suppliers: "Consolidating the number of suppliers, getting stronger partnerships with fewer suppliers, give them each more work to do and get rid of all these others so we don't have 250 different people. We've got like 30, and then we've got a strong partnership that we can rely on and that kind of thing." (GCX 53(a) at 14.) Respondent's rushed outsourcing efforts, however, were directly contrary to this goal. While Respondent looked to several established suppliers to increase outsourcing, these companies in turn had to outsource *their* painting work with other companies that Respondent did not have a relationship with. (GCX 67 (indicating that RDM is working with numerous painting companies to quote powdercoating of loaders and chassises); GCX 68 (Innova stating that it is looking at various painting companies to handle increased painting work that it does not have capability to handle in house); GCX 70 (Weisgram indicating that it would be outsourcing loaders and that they would be liquid painted); GCX 71 (RDM quoting materials with D & K Powdercoating); GCX 74 (Innova quoting painting with 59 Finishing); GCX 75 (RDM quoting painting with Accu-Rite, D & K Powdercoating, and Metal Finishers, Inc.).) In addition, due to the volume of work

being outsourced, Respondent actually attempted to develop relationships with *new* suppliers on the eve of the election. (GCX 77 (Respondent soliciting welding bids with Anderson Welding and Mfg, Inc. based on recommendation of another supplier).)

e. Respondent's outsourcing discussions prior to the union activity were categorically different than the outsourcing that occurred on the eve of the union election

Respondent will also likely argue, in support of its outsourcing of paint work, that it had discussed outsourcing work prior to the onset of Union activity. Admittedly, Respondent did discuss outsourcing at its April 16 meeting with employees. However, the context in which this outsourcing was discussed was *completely* different from that which occurred after employees accelerated their union activity. As explained by DiBiagio,

> Supply chain, same kind of things we've talked about, looking at what we're outsourcing, and looking at what insourcing. What are we sending out? What are we bringing in? Some of that is gonna stay where it is, some of it's going reverse. We're gonna bring in some stuff that we're not pulling today. We're gonna send out some stuff that we are pulling today, because it makes it a lot more sense, okay, to do that. Two things, and I know lot of you guys that are in here, and again I just tell it like it is. We have a very, very, very, very slim chance of ramping this plant up to 25 to 30 machines a day and think that we're going to be able to make all the chassis and motors and paint everything. Right now, we barely have the capacity to do that, to do what we need to do. It's very difficult on a lot of our qualified welders. We have a lot of good welders on staff. You guys do an awesome job, but imagine trying to get three to four times the number of folks that we have today. We just can't find the people, okay it's very difficult. Same thing in paint, we've got some great guys in paint. But to think that we can quadruple the staffing in there and get four times the number of people and run two shifts, three shifts, five days a week, whatever, but we just can't find it. So, we gotta start planning to say, okay, how are we going to ramp up to these levels of 25-30 machines a

> day and be successful and not sit here and say, oh, we don't have this, we don't have that, we don't have this, we can't do this, and we can't do that. . . While we're doing that, does it mean we're shutting all this other stuff down? No, it doesn't. We're gonna still be making stuff here. We're still going to be cutting. We're still going to be welding. We're still going to be painting stuff. But, I don't think that we're going to be able to expand paint and expand our welding capability up to that 25-30 machines a day kind of a level and look at us when we're trying to do five a day, six a day, seven a day. We really, really struggle. So, we'll do what we can. We'll play into our core competencies. We'll do what we do well and exploit that and not get too deep into stuff that we don't do as well. It doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. So, that's what we're looking at. I didn't want anybody to say, oh geez, now they're going in this line and we're going to shut down welding or shut down paint. (GCX 53(a) at 10–12.)

This lengthy exposition by DiBiagio reveals two things: first, Respondent's outsourcing efforts were designed, at least in part, to deal with the difficulties of finding qualified workers and the inability to deal with an *increase* in orders; and second, that while Respondent may have been exploring the outsourcing of certain parts, it was also intending to *insource* other parts in order to maintain work for the existing employees.[53] In fact, DiBiagio, during this meeting, repeatedly emphasized to employees that the line was not shutting down, and that employees "were not in danger of losing their jobs or anything like that" due to the outsourcing.

However, only a month and a half later, Respondent dramatically shifted course. Now, the outsourcing was going to lead to a decrease in work, and would be used to support the layoff of numerous employees. By contrast, insourcing was no

[53] In fact, the message that outsourcing would be balanced by insourcing was expressed to employees over a period of months by Respondent leading up to the layoffs: GCX 6 at 15; GCX 7 at 9–10; GCX 8 at 7.

longer a point of interest for Respondent.[54] The intervening event? The filing of election petitions and sustained organizing activity by Respondent's employees.

f. The Custom Products trip report directly attributes the outsourcing to union activity

Finally, there is direct evidence that suggests that Respondent's outsourcing of the paint department work was *directly* motivated by the paint department's union activity. Custom Products employee Adam Hughes wrote a trip report after visiting Respondent's facility on July 11, 2014. In this report, he stated:

> Terex is trying to get out of the painting business for two main reasons. They do not have a waste treatment system capable of handling the volume of product they are producing. The union also just recently succeeded in getting their foot in the door at Terex, but only in the paint department. *It is their goal to eliminate painting, therefore eliminating the union in the Grand Rapids plant*.
>
> (GCX 17.) (emphasis added).

Prior to his visit, Hughes admitted that he had no knowledge of the union activity at Respondent's facility, and that someone had told him about the union activity while he was there. (Tr. 160–61.) Hughes also admitted that he did not make the statement up, and that "[he] must have picked it up somewhere while [he] was in the building." (Tr. 162.)[55] While he was in the Terex facility, Hughes stated that

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[54] The totality of Respondent's insourcing efforts during this time period consisted of bring back the rails for the PT-30 machine. (CPX 9–11; Tr. 1690–94 (stipulating that CPX 10 and 11 were the only documents provided in response to Charging Party's subpoena request for insourcing documents).)

[55] When pressed on cross-examination by Respondent's counsel, Hughes again reiterated that "I don't think I would have put it in there if I wouldn't have heard it somewhere, but I don't recall exactly who said that." (Tr. 173.) When Respondent's attorney continued to press Hughes on whether he actually heard someone from

he mainly met with Travis Antilla, Rob Levitz, and Todd Monroe. (Tr. 161—62.) Therefore, the statement is likely attributable to one of these three people.

These individuals are all in a position to represent Respondent's motivations regarding its outsourcing. These were the three individuals that Respondent sent to meet with the supplier and discuss issues related to Terex's finishing expectations. Respondent admitted that Travis Antilla was a supervisor. Further, Levitz appears to have been serving as an agent in his dealings with Custom Products—according to the report, he stated that he would be able to provide a "written deviation for [Respondent's requirements] for overall thickness for powder paint." (GCX 17 at 2; *see also* GCX 16(a) (Levitz directing that cabs be returned to Custom Products); GCX 71 (June 11 email from Levitz directing Innova to have subcontractors perform tests on paint quality); GCX 73 (Levitz email to RDM indicating that "Terex will seek remedies from RDM" if there are issues with powdercoating).) Additionally, out of hundreds of employees, Monroe was clearly someone who was had a position of responsibility in dealing with Respondent's suppliers, as he was one of only three representatives to formally meet with Custom Products. Accordingly, this sentiment represents an accurate reflection of the motivation for Respondent's outsourcing—that motivation being the employees' union activity.[56, 57]

Respondent make this statement, he again stated "It's sure possible, but I recall hearing that that day. I don't recall exactly the source where it came from." *Id.*

[56] Respondent, in a last ditch effort to rebut the unlawfulness of its outsourcing, claims that bringing the outsourced work back is infeasible due to the zinc problem.

4. Respondent's Suspiciously-Timed Reclassification of Brandon Rajala and Mike Willson to the Assembly Department Was Unlawfully Motivated

Respondent's curious treatment of welding and fabricating employees Brandon Rajala and Mike Willson also was unlawfully motivated in violation of Section 8(a)(3) of the Act. In this regard, Respondent temporarily transferred Rajala and Wilson out of their welding and fabrication positions and into positions at Respondent's test track in January 2014. According to Willson, at the time of the initial, supposedly temporary transfer, Rajala and Willson were told that the transfer would only be for three or four weeks. (Tr. 882.)

As part of their "temporary" transfer, Rajala's and Willson's wages stayed at the higher welding and fabrication rates. Once the Union campaign began, Rajala in particular began openly campaigning for the Union, asking employees in many different departments to sign cards. (Tr. 867–68.) Willson also was a union supporter; he signed an authorization card and attended many union meetings. (Tr. 886.) In the lead up to the election, Willson and Rajala were the target of Respondent's manager Buck Storlie's union animus. About a week or two before the assembly election, Willson and Rajala, in a conversation with Storlie, brought up

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This argument is clearly spurious, as it ignores the fact that Respondent's outsourcing has *not* achieved compliance with the zinc pollution issue and that Respondent has developed a treatment system that *would* achieve compliance with the zinc issue.

[57] Respondent also argues that this outsourcing is barred by Section 10(b) of the Act. This affirmative defense should be rejected, as all of the outsourcing in response to the Union campaign occurred *within* the 10(b) period. Indeed, the complaint allegation only covers the outsourcing that occurred within six months of the filing of the relevant charge. (GCX 1(x); GCX 1(z).)

the Union campaign. In response to the employees' acknowledgement of the Union campaign, Storlie told them that "Terex isn't fucking screwing around. They will move the plant." (Tr. 872; *see also* Tr. 891–92.) This conversation indicates not only knowledge of union activity by the two employees, but also direct evidence of animus towards that activity.

On July 3, *only days after the assembly election*, Respondent permanently transferred Rajala and Willson to positions in the assembly department—lowering their wage rates. (GCX 38, 40.) At the time of this transfer, Rajala and Willson were given no explanation for their transition from welding and fabrication to assembly. (Tr. 862, 884–85.) The timing of this change is extremely suspicious, as it had the effect of preventing two known union supporters from being eligible to vote in the assembly election. Thus, under *Wright Line*, the burden shifts to Respondent to provide a neutral justification for the change in wage rates and assignment right after the election.

Respondent offered no real defense to rebut the suspicious timing of this change. While Schultz admitted to this change (Tr. 1884), she did not provide any neutral justification. Accordingly, the change in pay rate was unlawful under Section 8(a)(3) of the Act.

C. A Gissel *Bargaining Order Is Necessary in this Case Given Respondent's Severe Unfair Labor Practices and the Union's Previously-Established Majority Status*

Under the Supreme Court's decision in *Gissel Packing Co.*, the Board is empowered to issue remedial bargaining orders in situations where "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun)

by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614–15.[58] This section will explain why a remedial bargaining order is appropriate in these circumstances: first, by addressing the severity of Respondent's unfair labor practices and how those unfair labor practices make chances of a fair re-run election slight; and second, by establishing that the Union possessed majority support in the assembly unit prior to the disputed election.

1. Respondent's Severe Unfair Labor Practices Obliterate the Chances of a Fair Re-run Election

This *Gissel* remedy here centers on Respondent's wanton threats of closure and job loss ahead of the assembly election. Although the discharges in the paint department certainly contribute to the necessity of a bargaining order, the threats and other 8(a)(1) violations here are more than enough to warrant issuance a *Gissel* bargaining order. Both the Board and courts have recognized the potency of these type of threats: "[T]he threat of job loss (i.e., discharge, layoff, and plant closure) because of union activity is among the most flagrant kind of interference with Section 7 rights and is more likely to destroy election conditions, and to do so for a longer period of time, than other unfair labor practices." *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993), *enforcement denied*, 31 F.3d 79 (2d Cir. 1994); *see also*

[58] The General Counsel believes that the evidence clearly establishes that a bargaining order is appropriate under a "Type II" *Gissel* theory, discussed above, and therefore will not be addressing this case under a "Type I" *Gissel* theory (those "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices). 395 U.S. at 613.

Chevmet Laboratories, Inc. v. NLRB, 497 F.2d 445, 448 (8th Cir. 1974) ("A threat to close the plant, when made in the context of the union organization of the employees, has long been recognized as one of the most potent instruments of employee interference with the right of employees to organize under the National Labor Relations Act.") (citing *Gissel Packing Co.*, 395 U.S. at 618–20); *see NLRB v. Jamaica Towing,* 632 F.2d 208, 213 (2d Cir. 1980) (A threat of plant closure "is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees."); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301–02 (6th Cir. 1988), and cases cited therein.

In line with this statement, the Board and courts have held that a *Gissel* bargaining order can be warranted on the basis of such threats. For example, in *Noll Motors, Inc.*, 168 NLRB 1029 (1967), *modified,* 180 NLRB 428 (1969), *enforced*, 433 F.2d 853 (8th Cir. 1970), the employer's president told employees in two meetings leading up a union election that, *inter alia*, employees could be terminated, that there were other plants that had unions and had shut down, and that the union would not be able to effectively negotiate better benefits for employees. 168 NLRB at 1030–31. On the basis of these statements, the Board held that a bargaining order, rather than a second election, would better reflect the policies of the Act. 180 NLRB at 428; *see Yolo Transport,* 286 NLRB 1087, 1094–95 (1987) and cases cited therein (surveying cases where Board has issued *Gissel* bargaining orders on basis of Section 8(a)(1) violations); *HarperCollins San Francisco*, 317 NLRB 168, 168, 181–86 (1995), (granting bargaining order despite

dismissal of all but one minor 8(a)(3) allegation related to use of an office by employee), *enforcement denied*, 79 F.3d 1324 (2d Cir. 1996) (enforcement denied based on, *inter alia*, employee turnover and lapse of time); *Kona 60 Minute Photo*, 277 NLRB 867, 871 (1985) (granting bargaining order, despite dismissal of Section 8(a)(3) violation, solely on basis of Section 8(a)(1) violations); *NLRB v. Ely's Foods, Inc.*, 656 F.2d 290, 292–94 (8th Cir. 1981) (bargaining order warranted based solely on employer's 8(a)(1) statements).

The unlawful statements at issue here fit squarely within the precedent discussed above. The top manager in the plant, Jim DiBiagio, threatened employees with plant closure, job loss, and other retribution if a union were voted in. And rather than disavowing these threats, executive George Ellis flew in specifically to inform employees that he supported DiBiagio and the other mangers, that *he* controlled the work, that other non-union Terex facilities could take the Grand Rapids work, and that Terex's other union facilities had, for the most part, closed. As in *Noll Motors*, these threats were "not carefully phrased to demonstrate probable consequences beyond [Respondent's] control nor to convey a management decision already arrived at to close the plant in case of unionization. [They were] rather phrased to predict that unionization would inevitably cause the plant to close, throwing employees out of work regardless of the economic realities." *NLRB v. Noll Motors*, 433 F.2d 853, 856 (8th Cir. 1970).

The circumstances of these threats of closure and other adverse consequences only heighten their unlawful effects. As laid out by the Board in *Milum Textile*

Services, 357 NLRB No. 169, slip op. 11–12 (2011), determining the appropriateness of a *Gissel* bargaining order depends on the seriousness of the violations; the number of employees affected; the dissemination of the violation amongst employees; and the identity of the individuals committing the unfair labor practices. Addressing these factors in order reveals the necessity of a *Gissel* bargaining order in this case. As discussed above, the threats of closure and other Section 8(a)(1) violations (not to mention the Section 8(a)(3) violations, discussed below) are *hallmark* violations that have been recognized by the Board and courts to constitute the most *serious* violations of the Act. These violations affected the entire unit, as they occurred at mandatory meetings of all assembly employees.[59] *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), *enforced*, 531 F.3d 321 (4th Cir. 2008); *Overnite Transportation Co.*, 329 NLRB 990, 992 (1999), *enforcement denied on other grounds*, 280 F.3d 417 (4th Cir.) (en banc); *cf. Cardinal Home Products*, *Inc.*, 338 NLRB 1004, 1011 (2003) (denying bargaining order where threats did not apply to entire unit and there were no threats of plant closure or job loss). As these threats *directly* affected the entire unit, evidence of dissemination is moot. Finally, the threats were not uttered by low-level managers, without authority to implement large-scale decisions about where work would be placed; rather, they were announced by the highest ranking official at the plant and the

[59] The Board has noted that these threats have a heightened coercive effect in a smaller unit, which supports the issuance of a remedial bargaining order. *State Materials, Inc.*, 328 NLRB 1317 (1999) (33 employees); *NLRB v. Berger Transfer & Storage Co.,* 678 F.2d 679, 694 (7th Cir. 1982) (impact of unfair labor practices increased in "small unit" of 42 employees*).*

president of the construction division—the latter of whom explicitly told employees that *he* controlled the location of work. *M.J. Metal Products, Inc.,* 328 NLRB 1184, 1185 & n.9 (1999), *enforced*, 267 F.3d 1059 (10th Cir. 2001), and cases cited therein; *Bakers of Paris,* 288 NLRB 991, 992 (1988), *enforced*, 929 F.2d 1427 (9th Cir. 1991) ("The effect of unfair labor practices is increased when the unlawful conduct is committed by top management officials, who are readily perceived as representing company policy and in positions to carry out their threats . . . ."). Therefore, under the factors discussed by the Board in *Millum Textile Services*, a bargaining order is warranted.

The timing and concentrated nature of these violations drives home the necessity of a *Gsisel* bargaining order. These threats did not occur in a vacuum; rather, they were explicitly triggered by the results of the paint election (Tr. 119, 1071–72), and occurred within days of the scheduled assembly election. *Kona 60 Minute Photo*, 277 NLRB 867, 871 (1985) (bargaining order warranted based in part on timing of Section 8(a)(1) violations); These threats also were not isolated; instead, they were repeated by various supervisors and executives over a concentrated period of time. *Harper Collins*, 317 NLRB 168, at 168, 185 (relying on "concentrated" nature of Section 8(a)(1) violations in granting bargaining order); *Bee Lo Stores*, 318 NLRB 1, 15 (1995) (high and low level managers), *enforcement denied*, 126 F.3d 268 (4th Cir. 1997). The message could not have been more clear to the assembly unit: Respondent was furious that one group of employees had the audacity to vote in favor of the Union, and its managers and executives were going

to do whatever it took to ensure that the next, larger group of employees did not. The desired fruits of Respondent's labor bore out when the union lost the election despite its previous majority support with assembly employees. Given these circumstances, the chances of holding a fair rerun election are slight and a bargaining order is warranted. *Gissel Packing Co.*, 395 U.S. at 614–15; *NLRB v. Ely's Foods, Inc.*, 656 F.2d 290, 292–93 (8th Cir. 1981).

Not content to let these unlawful statements stand alone, Respondent bolstered their chilling effect by unlawfully terminating employees in other units—including over 50 percent of those employees in the painters' unit that voted in favor of the Union. Although the myriad threats directed at assembly employees are enough, in and of themselves, to warrant a bargaining order,[60] the message sent by these terminations utterly destroys the chances of a fair re-run election and drives home the necessity of a remedial bargaining order. The Board has consistently found bargaining orders to be appropriate where, as here, an employer threatens employees' jobs and thereafter carries through on those threats by terminating employees. *E.g., State Materials, Inc.*, 328 NLRB 1317, 1317 (1999) ("The threats of job loss followed by the discriminatory discharges demonstrated to the unit employees the Respondent's willingness to carry out its threats and brought home to the employees that the penalty for union support would be severe."); *Garvey Marine*, 328 NLRB 991, 994–95 (1999), *enforced*, 245 F.3d 819

[60] Indeed, the Regional Director is seeking injunctive relief under Section 10(j) of the Act, including an interim remedial bargaining order, solely on the basis of these Section 8(a)(1) allegations.

(D.C. Cir. 2001); *Airtex*, 308 NLRB 1135, 1135–36 (1992). The same result should follow here.[61]

The fact that these terminations occurred outside the bargaining unit in which the *Gissel* order is sought is irrelevant. The Board has consistently held that unfair labor practices directed at employees outside the bargaining unit can be used in support of a *Gissel* bargaining order. *California Gas Transport*, 347 NLRB 1314, 1325 (2006), *enforced*, 507 F.3d 847 (5th Cir. 2007); *Holly Farms Corp.*, 311 NLRB 273, 282 (1993), *enforced*, 48 F.3d 1360 (4th Cir. 1995).[62] The terminations here are especially relevant to the appropriateness of a bargaining order in the assembly unit. The terminations were focused, in large part, on the paint department that had just successfully organized. Respondent clearly and explicitly intended these terminations to have an effect on the assembly department, as it told these employees on the eve of the assembly election to "sit back and watch in real life what happens to employees who vote for a union" *only days after it had finalized the termination of over half the paint unit*. (GCX 12 at 11.) These post-election terminations deleteriously and irrevocably impact the chances of future organizing, and make the chances of holding a fair re-run election in the assembly department slight. Accordingly, although these terminations are not necessary to establish the

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[61] The fact that these terminations occurred *after* the election at issue provides further support for issuance of a bargaining order, as they indicate Respondent's continuing willingness to violate the Act. *See, e.g., Airtex*, 308 NLRB at 1136.
[62] The Supreme Court has recognized that the impact of a closure extends well beyond the immediate bargaining unit. *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263, 275–76 (1965).

appropriateness of a *Gissel* bargaining order, they conclusively prove that such an order is vital here.

Respondent's lame efforts at repudiating its conduct should also be disregarded. Respondent will likely point to two pieces of evidence in support of this position: Ellis's alleged statement near the end of his meeting that Respondent would not shut down, and a letter and meeting in October assuring employees of their protected rights. Neither of these contrived efforts affects the appropriateness of a *Gissel* bargaining order in the instant circumstances. Assuming that the Ellis statement was even made, the statement does not provide any assurances of job security to employees (particularly in light of his explicit assurances about the job security of managers). In addition, this isolated statement does little to dampen the repeated threats of closure made before and after by Ellis, DiBiagio, and other managers. Similarly, the October letter (RX 3) and meeting (RX 52), which were remote in time from both the disputed election and the alleged unfair labor practices, are too little and far too late to ensure the possibility of holding a fair re-run election. Indeed, Terex's stale assurances that it "respects the right of team members to choose in a secret ballot election whether or not to be represented by a union" ring hollow in light of the severe unfair labor practices that occurred on the eve of the assembly election. *Evergreen America Corp.* 348 NLRB at 181 (2006) (finding that letter issued day before election assuring employees' that there would be "no relocation, no loss of positions and no reprisals" insufficient to repudiate employer's unlawful conduct).

Finally, it should be noted that, as of this filing, there have not been changed circumstances at Respondent that would warrant denying a remedial bargaining order. As an initial matter, the Board does not traditionally consider changed circumstances, instead focusing on state of affairs at time of alleged unfair labor practices. *See, e.g., Evergreen America Corp.*, 348 NLRB at 181–82 (noting that "Board's practice is to evaluate the appropriateness of a *Gissel* bargaining order as of the time that the unfair labor practices occurred," but analyzing current circumstances due to criticism from certain courts). Even assuming that it did, the present circumstances here do not obviate the need for a bargaining order. There is no evidence of significant employee turnover in the assembly department. The managers who uttered these unlawful statements still retain their positions with Respondent. *See, e.g., California Gas Transport*, 347 NLRB at 1326 (noting as a factor in support of bargaining order). The Union continues to maintain an interest in organizing the facility, and has continued to hold meetings and handbill at the plant. And while Terex has admittedly sold a portion of its ownership interest to a different company, there is no evidence that this transition has affected management from a labor-relations perspective or that it has affected employees' terms and conditions of employment.

2. The Union Established Majority Status Through Authenticated Authorization Cards

The evidence adduced at hearing establishes that the Union had support from 26 of the 41 employees in the bargaining unit (63%) prior to the unfair labor practices at issue here, and therefore establishes the necessary majority support to

issue a *Gissel* bargaining order. Given the unfair labor practices discussed above, such an order is appropriate and necessary.

Under established Board precedent, a union can establish the majority support necessary for a bargaining order through the existence of valid authorization cards signed by a majority of employees in the bargaining unit. The lead case in determining the effectiveness of authorization cards is the Board's decision in *Cumberland Shoe*, 144 NLRB 1268 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965). Under this decision, which has been embraced by the United States Supreme Court and the Eighth Circuit, an unambiguous authorization card (often referred to as a "single purpose" card) that states that the union will be representing an employee for purposes of collective bargaining will generally be considered valid in terms of establishing majority support. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 584 (1969); *Cumberland Shoe Corp.,* 144 NLRB at 1269.

In determining whether a card falls within the ambit of the *Cumberland Shoe* presumption, the question is whether the card, on its face, authorizes the union to represent the signer for purposes of collective-bargaining. The cards at issue here—all of which are identical—satisfy this standard. They unambiguously state that a signer "select[s] the above-named union as [the signer's] collective bargaining representative." (*E.g.,* GCX 45(a).) The cards then explain the purposes for which the cards can be used for: "gaining voluntary recognition or to gain an election or both." (*Id.*) In *Mayfield Produce Co.*, 290 NLRB 1083, 1088 & n.16. (1988), the Board held that cards nearly identical to those present here fall under the

Cumberland Shoe doctrine, and accordingly the language of the card should govern unless employees are informed that the card will *only* be used for an election.

Under *Cumberland Shoe*, all of the cards here are valid for purposes of establishing representation. There is no evidence that any of the 26 employees who signed cards were told that the cards could be used *only* for an election. Nor is there any indication that the totality of the circumstances suggested to employees that this was the case. Indeed, the materials that the union made available to explain the cards clearly indicate that the card was used to establish majority status. (GCX 44.)

In addition to the cards serving as valid demonstration of support for the union, the evidence adduced at hearing authenticates each of the twenty-six cards utilized to establish majority support for the Union. Seven of the twenty-six cards were authenticated directly by the signer of the card. (GCX 45(b),(c),(j),(k),(n),(o),(p).) Each of these employees testified that they filled out and signed the cards, and that no representation was made by the solicitor of the card sufficient to rebut the plain language of the cards. (Tr. 557, 592–93, 608–12, 614–15, 626–27, 990.)

The other nineteen cards were authenticated by the solicitor of the cards. (GCX 45(a),(d)–(i),(l),(m),(q)–(z).) It is well-established that the solicitor of an authorization card can authenticate the card for purposes of proving majority support. *E.g., McEwen Mfg. Co.*, 172 NLRB 990, 992 & nn. 14,15 (1968), *enforced sub nom. Amalgamated Clothing Workers of America v. NLRB*, 419 F.2d 1207 (D.C.

Cir. 1969), and cases cited therein; *Evergreen America Corp.*, 348 NLRB 178, 179 (2006), *enforced*, 531 F.3d 321 (4th Cir. 2008). Here, for seventeen of these nineteen cards (GCX 45(a),(d)–(i),(q)–(z)), the solicitor testified that he witnessed the cards being filled out and signed, and that after this was done, the cards were returned directly to the solicitor. Additionally, none of the solicitors testified that they told signers that the cards could be used only for an election or made other misrepresentations sufficient to negate the plain language on the cards. (Tr. 466, 471–83, 521–23, 933–50, *see* Tr. 536–40; GCX 45(g)(1).) This is sufficient to authenticate these cards.

As to the two remaining cards for which there is no direct testimony from the signer, and the solicitor did not witness the act of filling out and signing the card, the record testimony establishes the authenticity of the cards. (GCX 45(l),(m).) Under *McEwen Mfg. Co.*, 172 NLRB at 992 and *Evergreen America Corp.*, 348 NLRB at 179, a card can be authenticated even when the solicitor did not witness the act of signing so long as the solicitor can testify that the cards were returned by the "signatory to the person soliciting them." This is precisely what happened with these two remaining cards. The solicitor gave the card to the signatory employee, later spoke with the signatory employee, and the signatory employee told the solicitor where the card could be found. In each case, the card was found by the solicitor, filled out and signed, in the location designated by the signatory employee.

(Tr. 552–57.) Accordingly, these cards have been authenticated under well-established Board precedent.[63]

D. The Board Should Not Defer this Matter to the Individual Settlement Agreements

Respondent will likely argue that, despite its unlawful actions, the Board should stay its hand and defer certain allegations to the non-Board settlements reached between some of the terminated employees and Respondent. Such a deferral would be fundamentally contrary to the intentions and policies of the Act as the aforementioned settlements not only constitute one thread on a string of unfair labor practices committed by the Respondent but also provide no reassurances to remaining employees that they would be protected from repercussions by Respondent for activities protected by the Act. Therefore, Respondent's argument should be rejected, for the reasons discussed below.

1. General Principles Applicable to this Case

In determining whether to defer to a parties' private settlement, two competing policies are at stake. One is that the Board's "power to prevent unfair labor practices is exclusive, and that its functions is to be performed in the public interest and not in the vindication of private rights." *Independent Stave Co.*¸287 NLRB 740, 741 (1987) (quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485

[63] The stipulated handwriting samples from the two employees who signed these cards should resolve any lingering doubt regarding authenticity. (GCX 45(l)(1),(m)(1).) According to the Board, a handwriting exemplar can be used as evidence of authentication if, in the view of the judge hearing the case, the handwriting is the same. *Parts Depot, Inc.*, 332 NLRB 670, 674 (2000), *enforced*, 24 F. App'x 1 (D.C. Cir. 2002), and cases cited therein. Here, a comparison of the handwriting on the disputed cards and the exemplars indicates that the handwriting comes from the same respective person.

(1957)). This exclusive power to enforce statutory rights is, however, balanced against the Board's policy of "encouraging parties to resolve disputes without resort to the Board's processes." *Id.* (quoting *Combustion Engineering*, 272 NLRB 215 (1984)).

In order to balance these policies, the Board, in *Independent Stave*, developed the following four part test to determine whether it should defer to a private settlement:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

In applying this test, the Board has made clear that "it will refuse to be bound by any settlement that is at odds with the Act or the Board's policies." *Id.* (citing *Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958)). Applying these four factors to the settlements at issue in the instant case establishes that the Board should not defer to the parties' private settlement agreements.

2. The General Counsel and Union Vehemently Object to the Settlements

This *Independent Stave* factor does not support deferring to the parties' settlement of some of the discipline at issue in this case. The settlements neither comply with the purpose of the Act nor adequately protect employees from retaliation for engaging in protected activity under the Act. The Regional Director

conducted a full investigation of the facts underlying the unfair labor practices and thereafter carefully weighed the aforementioned competing statutory policies. After weighing these policies, the Regional Director decided that the purposes and policies of the Act could only be realized by issuing complaint in this case. The Board, as has been noted in numerous cases is loath to disturb a reasoned exercise of prosecutorial discretion in this arena. *Frontier Foundries*, *Inc.*, 312 NLRB 73, 74 (1993); *Clark Distribution Systems, Inc.*, 336 NLRB 747, 750 (2001); *see also BP Amoco Chemical*, 351 NLRB 614, 619 (2007) ("The Board has traditionally given considerable weight to opposition by the General Counsel.") (Member Liebman, dissenting).

In addition to the General Counsel's strident objection to these settlements, the Union was not consulted on the settlements for the represented employees. They were not parties to the negotiation of the settlements, nor were union representatives present when employees were presented with the agreements. In addition, the Union has indicated, through its interactions with Respondent and its continued efforts to aid in the prosecution of these terminations, that it objects to the terms of the settlement. Accordingly, the Union's joining with the General Counsel's objection to the settlements further weighs in favor of non-deferral. *Webco Industries,* 334 NLRB 608, 611 (2001) (union's nonacquiescence to settlement supports decision not to defer).

3. The Settlements Are Unreasonable in Light of the Serious and Collective Violations of the Act

The Board also considers the adequacy of the remedy in deciding whether to defer a parties' settlement, and whether the proposed remedy supports the underlying policies of the Act. Here, the proposed settlements do nothing to further the collective rights of the vast majority of employees impacted by Respondent's unfair labor practices. The complaint here alleges wide-ranging and severe threats in individual and collective conversations that are left wholly unremedied by the settlement agreements. The complaint also seeks an order requiring Respondent to collectively bargain with the Union, a remedy which lies at the very heart of the Act and which is similarly unaddressed by the individual agreements. Finally, to the extent that the individually signed agreements do purport to adequately "remedy" the unfair labor practices related to the terminations, the agreements do not even wholly address these terminations, as several employees refused to sign the agreements. Accordingly, deferring to these agreements would eviscerate the General Counsel's ability to protect the collective rights embodied in the Act.

Moreover, the settlements at issue contain major remedial deficiencies. The terms of the severance agreement essentially provide only eight weeks of severance pay. (RX 4 at § 3.) The amount of income provided by the severance package is grossly inadequate in light of the filed ULP's that remain to be considered and the broad waiver contained in the agreement. (*See* RX 4 at §5.2.) Should the General Counsel's views be found true, aggrieved parties would be entitled to potentially years of backpay as well as reimbursement for loss of benefits. Such a limited

monetary remedy is simply unreasonable in light of the severe unfair labor practices alleged. *See Frontier Foundries,* 312 NLRB at 74 (rejecting settlement in part because it provided only six percent of the backpay owed to employees).

Similarly problematic from a remedial standpoint is the absence of reinstatement and notice to employees. The Board has held that either a notice, reinstatement, or (preferably) both is necessary to send an adequate message to employees as a whole that Respondent's unfair labor practices will not be condoned. *Flint Iceland Arenas*, 325 NLRB 318, 319 n.4 (1998). Where, as here, employees are simply bought off for a middling sum of money, the collective reassurance to their co-workers provided by traditional statutory remedies is lost. Accordingly, as the settlements provide only a limited individual remedy in a situation implicating core *collective* rights under the Act, they do not warrant deferral.

4. The Severance Agreements Were Brought Together Under Coercive Circumstances

As evidenced through Rick Andrews' testimony, at least some of the agreements were reached under coercive circumstances. When asked if he signed the severance agreement Mr. Andrews replied, "I have three kids and high house payment with no income? I had to sign it." (Tr. 800.) Mr. Andrews' emphasis on *having* to sign the agreement indicates that the company utilized its near monopoly on the local labor market to achieve compliance and by extension, illustrates the coercive circumstances under which the agreement was proposed. This is clearly contrary to the intentions of the Act and should thus justify a deferral of settlement.

5. The Presence of Other Severe, Unremedied, and Related Unfair Labor Practices Precludes Deferral

While the history between Respondent and the Union here is short, there is evidence to suggest that even after the settlement agreements were reached that Respondent continued to retaliate against employees for engaging in union or protected concerted activity by conducting a second round of unlawful layoffs in August. There is also a plethora of unlawful conduct alleged in the complaint in this case that is wholly unremedied by the severance agreements coercively proposed by Respondent. As noted by the Board on several occasions, the presence of accompanying unremedied unfair labor practices supports a decision not to defer to the parties' settlement agreement. *Goya Foods, Inc.*, 358 NLRB No. 43, slip op. at 3 (2012); *Flint Iceland Arenas*, 325 NLRB at 319.

Even assuming, arguendo, based on the lack of history between the parties, that this *Independent Stave* factor weighs in favor of deferral, it does not overcome the weight of the three factors listed above. The absence of prior specific settlement breaches or violations of the Act does not automatically mandate that the Board defer to any settlement agreement reached between the parties. In fact, the Board has found to the contrary in several decisions. *Frontier Foundries, Inc.*, 312 NLRB at 74 (refusing to defer, despite absence of coercion or previous unfair labor practices, where General Counsel opposed settlement agreement and remedy was inadequate); *Flint Iceland Arenas*, 325 NLRB at 319 (same). Consequently, regardless of the adjudicated decision in regards to this factor, the settlements do not warrant deference.

IV. CONCLUSION

In short, the evidence at hearing established that Respondent committed flagrant violations of Section 8(a)(1) of the Act by threatening employees with job loss, plant closure and other unspecified consequences in retaliation for their union activity. After issuing these threats, Respondent then unlawfully terminated thirteen employees—including over half of the painters' unit that had recently and successfully organized—and outsourced much of its paint work, in violation of Section 8(a)(3) of the Act. These actions cannot be condoned, as they were triggered by employees' exercise of protected rights and were motivated by Respondent's singular animus towards union activity and the rights guaranteed under federal labor law.

Counsel for the General Counsel respectfully submits that the record evidence and the law establish that Respondent violated the National Labor Relations Act as alleged in the Complaint. Accordingly, the General Counsel requests that the Administrative Law Judge issue a Recommended Order to reinstate the terminated employees and make them whole. Counsel for the General Counsel further requests that the Administrative Law Judge issue an order requiring Respondent to return its unlawfully outsourced work in the paint department. Counsel for the General Counsel also requests an order requiring Respondent to bargain with the petitioned-for unit of employees in its assembly department. Finally, General Counsel requests that the Administrative Law

Judge issue an appropriate Notice to Employees to remedy Respondent's violations of the Act.

Dated: January 30, 2015

Respectfully submitted,

/s/ Tyler J. Wiese

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APPENDIX A: PROPOSED NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

As you may know, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO filed a charge with the National Labor Relations Board against A.S.V., INC. A/K/A TEREX alleging that we violated the National Labor Relations Act. As a result of that charge, we have been ordered to post this notice by the National Labor Relations Board.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- ✓ Form, join, or assist a union;
- ✓ Choose a representative to bargain with your employer on your behalf;
- ✓ Act together with other employees for your benefit and protection;
- ✓ Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights granted by Section 7 of the Act.

WE WILL NOT threaten employees that the Grand Rapids facility will or could close because of their support for International Brotherhood Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Union) or any other labor organization.

WE WILL NOT threaten employees that the Grand Rapids facility will or could close if employees vote to be represented by the Union or any other labor organization.

WE WILL NOT tell employees that the future of the Grand Rapids facility is dependent on the results of a National Labor Relations Board election.

WE WILL NOT threaten employees that work from the Grand Rapids facility could be transferred to other facilities owned by us.

WE WILL NOT threaten employees by stating that other Terex facilities have lost work after employees in those facilities chose to be represented by a union.

WE WILL NOT threaten employees by implying that other Terex facilities have closed because employees in those facilities were represented by a union.

WE WILL NOT threaten employees that could be moved within a day if employees choose to be represented by the Union or another labor organization.

WE WILL NOT threaten employees that management has the power to decide where work from the Grand Rapids facility will be performed.

WE WILL NOT threaten employees with adverse economic consequences if they support the Union or any other labor organization.

WE WILL NOT threaten employees with unspecified reprisals in retaliation for their support of a union.

WE WILL NOT tell employees that their support for the Union or any other labor organization inherently damages the company.

WE WILL NOT inform employees that management no longer trusts employees because of their support for the Union or any other labor organization.

WE WILL NOT threaten employees that they mean nothing to us if they support the Union or any other labor organization.

WE WILL NOT tell employees that support for a union is futile because the company will not negotiate in good faith if the employees choose to be represented by the Union or any other labor organization.

WE WILL NOT interrogate employees about their reactions and thoughts regarding our captive audience meetings.

WE WILL NOT terminate or permanently layoff employees in retaliation for their union or protected concerted activities.

WE WILL NOT transfer employees or adjust their wage rates in retaliation for their union or protected concerted activities.

WE WILL NOT outsource work in retaliation for employees' union or protected concerted activities.

WE WILL NOT fail and refuse to bargain in good faith with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Union) as the exclusive collective-bargaining representative of assembly employees in the following appropriate unit ("Assembly bargaining unit"):

> All full-time and regular part-time assemblers employed by Respondent at its Grand Rapids, Minnesota facility, including team leads; excluding all other employees, temporary employees, managers, guards, and supervisors as defined in the Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal whole for any loss of wages and other benefits as a result of their terminations/permanent lay-offs.

WE WILL, within 14 days from the date of the Board's order, offer Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without loss of seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's order, remove from our files any references to the unlawful terminations/permanent layoffs of Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, and within 3 days thereafter, **WE WILL** notify each of them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's order, return the painting work that was unlawfully outsourced.

WE WILL, within 14 days from the date of the Board's order, return Brandon Rajala and Mike Willson to their positions in the welding and fabrication department and restore their wage rates.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the assembly employees in the Assembly bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief to the Administrative Law Judge on Behalf of the General Counsel was filed via e-filing and served on January 30, 2015, by the methods indicated on the parties whose names and addresses appear below.

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